TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 220. 125.

JOHN McQUADE, PLAINTIFF IN ERROR,

vs.

THE INHABITANTS OF THE CITY OF TRENTON.

IN ERROR TO THE COURT OF ERRORS AND APPEALS OF THE STATE OF NEW JERSEY.

FILED JUNE 17, 1897.

(16,612.)

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(16,612.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 399.

JOHN McQUADE, PLAINTIFF IN ERROR,

vs.

THE INHABITANTS OF THE CITY OF TRENTON.

IN ERROR TO THE COURT OF ERRORS AND APPEALS OF THE STATE OF NEW JERSEY.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., NOVEMBER 29, 1897.

a Supreme Court of the United States.

In the Matter of the Petition of JOHN MCQUADE for a Writ of Error to the New Jersey Court of Errors and Appeals.

The petition of John McQuade respectfully shows that on or about the 21st day of November, 1895, in a cause wherein The Inhabitants of the City of Trenton were complainants and respondents, and the said John McQuade was defendant and appellant, the New Jersey court of errors and appeals, being the highest court of law and equity of the State of New Jersey in which a decision could be had in said cause, made and filed a decree and remittitur in favor of the said The Inhabitants of the City of Trenton and against the petitioner, in which, as well as in the proceedings had prior thereto, and the record in said cause, certain errors have happened to the prejudice of your petitioner, all of which will more fully and at large appear from the assignment of errors filed herewith.

Wherefore, petitioner prays that a writ of error be issued
b from this honorable court in petitioner's behalf to the said New Jersey court of errors and appeals for the correction of the errors so complained of, and that a transcript of the record proceedings and papers in the said cause, duly authenticated, may be sent to this court.

And your petitioner will ever pray, etc.

DAVID McCLURE,
Attorney for Petitioner, 22 William Street, New York.

c Supreme Court of the United States.

In the Matter of the Petition of JOHN MCQUADE for a Writ of Error to the New Jersey Court of Errors and Appeals.

Assignment of Errors.

Now comes the said John McQuade by David McClure, his attorney, and in connection with his petition filed herein praying for a writ of error to the New Jersey court of errors and appeals, to correct the errors made by said court in a certain cause wherein The Inhabitants of the City of Trenton were complainants and respondents, and the said John McQuade was defendant and appellant, avers that in the record of proceedings in said cause and in the decree and remittitur made and filed in said cause by the said New Jersey court of errors and appeals on or about the 21st day of November, 1895, there is manifest error, to wit:

I.

That the said New Jersey court of errors and appeals erred by affirming in said decree and remittitur the decree of the court of chancery made in said cause on or about the 9th day of April, 1895,

whereby it was adjudged that the said John McQuade be
d perpetually enjoined and restrained not only from further interfering with the laying and completion of the sidewalk and curbing mentioned in the bill of complaint in said cause, but also from in any manner removing, disturbing or interfering with the said pavement, sidewalk or curbing after the same should have been completed, and that a writ of injunction issue accordingly.

II.

That the said decree and remittitur is erroneous because by it the complainants and respondents in said cause are permitted to take the private property of the said John McQuade for public use without just compensation as required to be made under the provisions of the Constitution of the United States and the amendments thereto.

III.

That the said decree and remittitur is erroneous because by it the Pennsylvania Railroad Company is permitted to take and injure the private property of the said John McQuade without just compensation as required to be made under the provisions of the Constitution of the United States and the amendments thereto.

IV.

That the said decree and remittitur is erroneous because through it the property of the said John McQuade is damaged without just compensation made for such damage to the said John McQuade.

e V.

That said decree and remittitur is erroneous because, by it, the right to take or injure the said John McQuade's property in the manner set forth in the pleadings and proofs in the said cause had not been acquired either by the said complainants and respondents or by the Pennsylvania Railroad Company by the exercise of the power of eminent domain or otherwise.

VI.

That the said court of errors and appeals erred in making the said decision and decree and remittitur because no procedure for taking or injuring private property in the manner shown in the pleadings and proofs in said cause has been at any time prescribed or enacted by the legislature of the State of New Jersey.

VII.

That the said court of errors and appeals erred in making the said decision and decree and remittitur because the record in said cause shows that the said John McQuade's property has been taken for public use without just compensation first made to him.

VIII.

That the said decree and remittitur is erroneous because by it the said John McQuade is deprived of his property without due process of law, in violation of the fourteenth amendment of the Constitution of the United States.

f IX.

That the said decree and remittitur of the said court of errors and appeals is erroneous because it is in sundry other respects contrary to the Constitution of the United States and the law of the land.

Wherefore, the said John McQuade prays that the decision and decree and remittitur of the said New Jersey court of errors and appeals be vacated, and that such other relief be granted to the said John McQuade as may be necessary and proper.

DAVID McCLURE,
Attorney for John McQuade, 22 William Street, New York.

g UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the court of errors and appeals of the State of New Jersey, Greeting:

[Seal of the Supreme Court of the United States.]

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said court of errors and appeals, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit, between John McQuade, appellant, and The Inhabitants of the City of Trenton, respondents, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity, or wherein was drawn in question the validity of a statute of or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity, or wherein was drawn in question the construction of a clause of the Constitution
h or of a treaty or statute of or commission held under the United States and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said appellant, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have

the same in the said Supreme Court, at Washington, within 30 days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 22d day of May, in the year of our Lord one thousand eight hundred and ninety-seven.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—
GEORGE SHIRAS, JR.,
Associate Justice of the Supreme Court of the United States.

i The answer of the judges of the court of errors and appeals in the last resort in all causes in the State of New Jersey, within named.

The record and proceedings whereof mention is within made, with all things touching and concerning the same, we do certify to the Supreme Court of the United States in a certain schedule to this writ annexed as within commanded.

ALEX. T. McGILL,
Chancellor, Presiding Judge of the Court of Errors and Appeals in the Last Resort in all Causes in New Jersey.

1 New Jersey Court of Errors and Appeals.

JOHN MCQUADE, Appellant,
and
THE INHABITANTS OF THE CITY OF TRENTON, Respondents. } On Appeal.

Bill for Injunction.

(Filed March 15, 1894.)

In Chancery of New Jersey.

THE INHABITANTS OF THE CITY OF TRENTON,
Complainants,
and
JOHN MCQUADE, Defendant. } On Bill for Injunction.

To his honor Alexander T. McGill, chancellor of the State of New Jersey:

Humbly complaining shows unto your honor, your orators, The Inhabitants of the City of Trenton, a municipal corporation existing under and by virtue of an act of the legislature of New
2 Jersey entitled "An act to provide for the more efficient government of the city of Trenton," approved March 19th, 1874, and the several supplements thereto and the acts amendatory thereof.

And your orators further show, that in pursuance of the power and authority vested in it under and by virtue of the act of the legislature aforesaid, the common council of the city of Trenton did, on or *the about* seventeenth day of February, eighteen hundred and ninety-one, finally pass an ordinance entitled "An ordinance to change the grade of a portion of Lamberton and Ferry streets, and to widen Bridge street, between Union and Warren streets, also to vacate a portion of Bridge street," in the city of Trenton, and which said ordinance was duly approved by his honor, the mayor of said city, on February twenty-first, eighteen hundred and ninety-one.

That said ordinance was introduced in said common council at a regular meeting prior to the meeting at which it was finally passed, and was read three times before its final passage, and was passed at a subsequent regular meeting to that at which it was introduced, and after its passage as aforesaid, was published for five days in two or more of the daily newspapers printed and published in the city of Trenton before the same took effect.

And your orators further show, that the change of grade on said portions of said streets aforesaid was made and said ordinance passed at the special instance and request, and by the procurement of the Pennsylvania Railroad Company, upon the express proviso that the said railroad company should, at its own expense, lay out, grade, curb, pave and dedicate a new street, thirty feet wide, between Warren and Fair streets, and should widen Bridge street, between Union and Warren streets, and should dedicate the part so widened to the city of Trenton, and should provide means to carry off all the surface water whose then present course would be diverted or changed by the aforesaid alterations and changes in said streets, and that said railroad company should file with the city solicitor a satisfactory agreement with the Inhabitants of the City of Trenton that they would furnish and pay for the labor and materials neces-
3 sary to make said alterations, and indemnify the said The Inhabitants of the City of Trenton against any expense or losses which might be incurred as damages to property affected, or otherwise, by the said changes of grade, and said vacation of portions of said street, and should, within thirty days after the passage of said ordinance, file a satisfactory bond with the city solicitor for the faithful performance of said agreement before mentioned, and that said ordinance should not go into effect until the said bond was filed and the expense of the passage of said ordinance paid; all which will more fully and at large appear by the said ordinance or from the certified copy thereof hereunto annexed and hereby made a part hereof.

And your orators further show, that the said Pennsylvania Railroad Company, at the time of the changes of grade and alteration of said streets as aforesaid, did pay the expense thereof, and did dedicate a new street between Warren and Fair streets, and did widen Bridge street, between Union and Warren streets, and did dedicate the part so widened to the city of Trenton, and did provide means to carry off all surface water whose then present course was diverted or changed by the aforesaid alterations and changes in

said streets, and did file with the city solicitor a satisfactory agreement with the Inhabitants of the City of Trenton that they would furnish and pay for the labor and materials necessary to make said alterations, and indemnify the said city against any losses or expense which might be incurred as damages to property affected, or otherwise, by the said changes of grades and alterations in said streets, and did, within thirty days after the passage of said ordinance, file a satisfactory bond with the city solicitor for the faithful performance of said agreement aforesaid, and before said ordinance went into effect, did pay the expense of the passage thereof, including the printing and publication thereof, and did perform all and singular the things precedent on said company's part to be done before said ordinance went into full force and effect, before the happenings, actings and doings of the said defendant as hereinafter set forth.

4 And your orators further show, that one John McQuade owns and occupies a house and lot of land on the northerly side of Ferry street, in said city of Trenton, which said premises of said John McQuade are on that portion of said Ferry street the grade of which was changed by virtue of the ordinance aforesaid.

And your orators further show, that on or about the seventeenth day of June, in the year eighteen hundred and ninety-two, and after the grade of said Ferry street had been changed, pursuant to the aforesaid ordinance, and after means had been provided for carrying off all surface water whose then present course was diverted or changed by the aforesaid alterations in said streets, Joseph R. Gilkyson, agent of the Pennsylvania Railroad Company, in said city of Trenton, was given authority and permission by John M. Rulon, street commissioner of said city of Trenton, to relay and reset the curb, gutter and pavement in front of the aforesaid property of said John McQuade, on said northerly side of Ferry street, and that on or about the said last-mentioned day, the said Joseph R. Gilkyson, by his workmen, servants and employees, did reset and relay the curb and pavement and gutter in front of the property of the said John McQuade aforesaid; and that while the said Joseph R. Gilkyson, his servants, workmen and agents were so employed in changing the grade of the said sidewalk, relaying the said pavement thereon and resetting the said curb-line and gutter thereof, the said John McQuade interfered with the said workmen, by not only notifying the said workmen engaged in the said work aforesaid, and warning them to absolutely desist and refrain from changing the grade of said sidewalk, relaying said pavement and resetting the said curb and gutter, but also endeavored forcibly to interfere with and obstruct *with* said work, and while the said work was progressing the said John McQuade, from the second-story windows of the house on the lot of land in front of which said grade was being changed, and said pavement, curb and gutter being relaid and reset, threw hot and cold water on the men so engaged

5 in the work aforesaid, himself, and had several other persons throwing water on the men out of the second-story windows aforesaid; that the said work occupied the space of about two hours,

and that during all that time the said McQuade interfered with and tried to prevent the said work in the manner aforesaid; and that in order to prosecute the said work, and in a measure to prevent said men so at work being deluged with water from said McQuade and his abettors, the workmen so engaged spread a large canvass over their heads in front of the property of the said McQuade and maintained the same during all the time that said work progressed.

And your orators further show, that the said work of relaying the pavement and resetting the curb-line and gutter thereof, in front of said property of the said John McQuade, was done under and by virtue of the authority of the street commissioner of the city of Trenton, acting under and by virtue of the ordinance hereinbefore particularly mentioned, and a copy of which said ordinance is hereunto annexed and hereby made a part hereof.

And your orator further shows, that after the relaying of the pavement in front of said property of said McQuade, and the resetting of the curb and gutter in front thereof, and on or about the — day of June, eighteen hundred and ninety-two, the said John McQuade did willfully and deliberately tear up the pavement so as aforesaid laid in front of his said premises, and disturbed, barred out and upset the curb and gutter so as aforesaid laid in front of his said premises on Ferry street, and that the said pavement in front of the said McQuade's premises has remained, and still remains, torn up and disturbed, and the street in front of said premises is uneven, holds water in times of rainfall, and is rendered well-nigh impassible for pedestrains by reason of its condition aforesaid, the said McQuade having dug a hole three or four feet square in the sidewalk in front of his said premises which he keeps filled with water when the same is not filled by the fall of rain; that the said John McQuade has informed the street commissioner of the city of Trenton and many other people that he disturbed and tore up said pavement
6 aforesaid and broke down the curb-line thereof, and that he will not permit the said pavement to be relaid, and that if it should be relaid he will tear it up again and as often as it is relaid and as fast as it is relaid.

All which actings and doings of said John McQuade are contrary to equity and good conscience, and tend to the manifest wrong, injury and oppression of your orators.

In tender consideration whereof, and forasmuch as your orators are without remedy at and by the strict rules of the common law, and can only obtain relief in this honorable court, where matters of this nature are particularly cognizable and relievable:

To the end therefore that the said John McQuade may answer this bill, but without oath, and particularly that he may set forth and discover whether or not he did willfully and deliberately tear up the pavement so as aforesaid laid in front of his said premises, and disturb, bar out and upset the curb and the gutter so laid in front of his said premises on Ferry street; and that by the order and decree of this honorable court the said John McQuade may be perpetually enjoined and restrained from in any manner interfering with, hindering or obstructing the laying of said pavement and the

resetting of said curb and gutter in front of said premises by your orators and those acting for them in the premises; and from tearing up, barring out or otherwise disturbing the pavement, curb and gutter when relaid and reset in front of his said premises by virtue of said ordinance; and that your orators may have such other and further relief as the nature and circumstances of the case may require, and as shall be agreeable to equity and good conscience.

May it please your honor, the premises considered, to grant unto your orators not only the State's writ of injunction issuing out of and under the seal of this honorable court, to be directed to the said John McQuade, his servants, agents and workmen, enjoining and restraining them and each of them from in any way interfering with, disturbing or obstructing the relaying of the pavement and
7 resetting of the curb and gutter in front of said premises, on the northerly side of Ferry street, in the city of Trenton aforesaid, pursuant to the provisions of the ordinance hereinbefore particularly mentioned and referred to; and from tearing up, barring out or otherwise disturbing the pavement, curb and gutter when relaid and reset in front of his said premises by virtue of said ordinance; but also the State's writ of subpœna likewise issuing out of and under the seal of this honorable court to be directed to the said John McQuade, commanding him on a certain day and under a certain penalty therein to be expressed, to be and appear before your honor in this honorable court, then and there to answer the premises and stand to, abide by and perform such order and decree therein as to your honor shall seem meet and as shall be agreeable to equity and good conscience.

And your orators, as in duty bound, will ever pray, &c.

EDWIN ROB'T WALKER,
Sol'r and of Council with Complainants.

STATE OF NEW JERSEY, }
County of Mercer, } *ss:*

John M. Rulon, of full age, being duly sworn according to law, on his oath says, that he is and has been continuously since the twentieth day of April, eighteen hundred and ninety-two, the street commissioner of the city of Trenton; that he knows John McQuade, the defendant in the above bill named; that he knows the premises of John McQuade, on the northerly side of Ferry street, in the city of Trenton, and that the said premises are situate on that portion of said Ferry street, the grade of which was changed by an ordinance entitled "An ordinance to change the grade of a portion of Lamberton and Ferry streets, and to widen Bridge street, between Union and Warren streets, also to vacate a portion of Bridge street," passed February seventee-th, eighteen hundred and ninety-one; that the grade of Ferry street aforesaid had been changed pursuant to said ordinance, before deponent became street commissioner of said city of Trenton; that as street commissioner as aforesaid,
8 he did, on or about the — day of June, eighteen hundred and ninety-two, give to Joseph R. Gilkyson, agent of the

Pennsylvania Railroad Company, in the city of Trenton, authority and permission to relay and reset the curb and gutter and pavement in front of the aforesaid property of said John McQuade, on said Ferry street, at the grade established by said ordinance; that after the giving of the said authority and permission as aforesaid, and under and pursuant to the authority so by deponent given to the said Gilkyson, he, the said Gilkyson, agent as aforesaid, on or about the — day of June, eighteen hundred and ninety-two, by his workmen, servants, and employees, did reset and relay the curb, gutter and pavement in front of the property of the said John McQuade aforesaid, and that thereafter, and on or about the — day of June, in the year last aforesaid, the said John McQuade did, willfully and deliberately, tear up the pavement so as aforesaid laid in front of his premises, and disturbed, barred out and upset the curb and gutter so laid in front of his said premises on Ferry street, and that the said pavement in front of said McQuade's premises has since remained, and still remains, torn up and disturbed, and the surface of the street in front of his premises, by reason thereof, is uneven, holds water in times of rainfall, and is rendered well-nigh impassable for pedestrians, by reason of its condition aforesaid, the said McQuade having dug a hole three or four feet square in the middle of the sidewalk, which he keeps filled with water when the same is not filled by the fall of rain; that the said John McQuade has himself informed this deponent that he disturbed and tore up the said pavement aforesaid and broke down the curb-line thereof, and that he will not permit the said pavement to be relaid, and that if it should be relaid he will tear it up again, and as often as it is relaid and as fast as it is relaid; that deponent has reset the curb-line in front of said premises, which at the present time remains undisturbed; that the aforesaid pavement, when laid in front of said McQuade's property, consisted of flagstone six feet in
9 width laid in the middle of said pavement, with bricks on the house side of said flags and also on the curb side of said flags; that the said McQuade has torn up the said flagstones and also all of the bricks aforesaid, and carted the same into and keeps them in the rear yard of his said premises, where the same now remains.

And deponent further says, that he has lived in the city of Trenton for the past thirteen years; that he is well acquainted with the property of the said John McQuade on the northerly side of Ferry street, in front of which the grade of Ferry street was changed by virtue of an ordinance of the common council as hereinbefore mentioned, and has been acquainted with the said premises and locality in which it is situate for the last twenty-five years; that at the time the change of grade was made on portions of Lamberton and Ferry streets, in the city of Trenton, under and by virtue of the ordinance aforesaid, and before this deponent became street commissioner of the city of Trenton, the Pennsylvania Railroad Company, who, by its agents, servants and workmen, actually made the change of said grade, provided the means to carry off all surface water whose then present course was diverted or changed by the aforesaid alterations

in said streets, by placing in and under said streets a good and sufficient surface-water drain; that deponent was frequently in the locality aforesaid where such changes of grade were made and saw the aforesaid drains built and put in, and that since deponent has been street commissioner as aforesaid, he has had and still has official knowledge of the fact of the existence of said drain, and knows that it is sufficient for the purpose for which it was constructed and intended.

JOHN M. RULON.

Sworn and subscribed before me, this thirteenth day of March, 1894.

THOS. E. KEATING,
Notary Public.

STATE OF NEW JERSEY, } ss.:
County of Mercer, }

10 Joseph R. Gilkyson, of full age, being duly sworn according to law, on his oath says, that he is the freight agent of the Pennsylvania Railroad Company in the city of Trenton; that as such agent he had charge of the laying of additional tracks of the Pennsylvania Railroad Company through a portion of the city of Trenton, in the years eighteen hundred and ninety, ninety-one and ninety-two; that on or about the — day of June, eighteen hundred and ninety-two, under and by virtue of the power and authority given to said Pennsylvania Railroad Company by an ordinance entitled "An ordinance to change the grade of a portion of Lamberton and Ferry streets, and to widen Bridge street, between Union and Warren streets, also to vacate a portion of Bridge street," passed February seventeenth, eighteen hundred and ninety-one, and also in pursuance of the authority and direction of John M. Rulon, street commissioner of the city of Trenton, deponent, by and with the aid of certain servants, agents and employees of the said Pennsylvania Railroad Company, did change the grade of Ferry street in said city of Trenton, in front of the lands and premises of John McQuade, on the northerly side of Ferry street; that previous to said — day of June, eighteen hundred and ninety-two, the grade of the road of said Ferry street beyond the curb-line of the property of said McQuade, had been changed in accordance with said ordinance, and that on said last-mentioned day and year deponent caused the sidewalk to be laid and the curb and gutter to be set in front of said McQuade's premises, at the said grade so established as aforesaid; that while the servants, workmen and agents of said railroad company, who were so employed in changing the grade of said sidewalk and relaying the said pavement thereon, and resetting the said curb-line and gutter thereof, the said John McQuade interfered with the work by not only notifying and warning the deponent and his assistants aforesaid to absolutely desist and refrain from changing the grade of said sidewalk and relaying the said pavement and resetting the said curb, but also endeav-

ored forcibly to interfere with and obstruct said work, and while
11 deponent was then and there present as aforesaid, the said John McQuade, from the second story window of his house on the lot of land in front of which said grade was being changed and said pavement and curb and gutter relaid and reset, threw hot and cold water on the men so engaged in the work aforesaid, himself, and had several other persons throwing water, both hot and cold, out of the second-story window on the men so at work aforesaid; that said work occupied the space of about two hours as nearly as deponent can now recollect, and that during all that time the said McQuade interfered with and tried to prevent the said work in the manner aforesaid in this deponent's presence; that in order to prosecute said work, and in a measure preventing said men so at work being deluged with water from said McQuade and his abettors aforesaid, the workmen so engaged in said work spread a large canvass on poles over their heads in front of the property of said McQuade and maintained the same during all the time that said work progressed; that since the work aforesaid was completed and the said sidewalk regraded and pavement relaid and curb and gutter reset at the grade established by said ordinance, the same has been torn up and the flagstones and bricks composing said pavement removed and a large hole dug in the middle of said pavement, and the curbstones pushed out of place and off the line on which they were set; that deponent saw this condition of affairs the next day after the said sidewalk was regraded and pavement relaid and curb and gutter reset; and that on one occasion since said last-mentioned occurrence, said John McQuade has told this deponent that he would not permit said sidewalk to be regraded and pavement relaid and curb reset, and that he would kill this deponent or any other man who would attempt to regrade said sidewalk, relay said pavement or reset said curb and gutter.

And deponent further says, that at the time of the change of the said grade on the aforesaid portions of Lamberton and Ferry streets, the Pennsylvania Railroad Company, by its agents, servants and workmen, under the supervision of this deponent, provided
12 means to carry off all surface water whose then present course was diverted or changed or would be diverted or changed by the aforesaid alterations in said streets, by placing in and under said streets a good and sufficient surface-water drain in accordance with the proviso for that purpose in said ordinance contained; and deponent further says that since the putting in of said drain, hitherto and until and at the present time, he, this deponent, has personal knowledge of the fact of the existence of said drain, and knows that it is sufficient for the purpose for which it was constructed and intended.

J. R. GILKYSON.

Sworn to and subscribed before me, this thirteenth day of March, 1894.

WM. J. RYAN,
Notary Public.

STATE OF NEW JERSEY, } ss:
County of Mercer, }

William Hartman, being duly sworn according to law, on his oath says, that he is captain of police in the city of Trenton, in charge of the second police district; that in and during the month of June, eighteen hundred and ninety-two, deponent was such police captain of said second district, in which is situate the property of John McQuade, on the north side of Ferry street, in said city; that on the seventeenth day of June, in the year last aforesaid, deponent received a message from the chief of police of said city of Trenton, stating that the mayor and president of the board of public works of said city had given orders to have a detail of police at said McQuade's premises to prevent any breach of the peace pending the relaying of the pavement and the resetting of the curb and gutter in front of said McQuade's said premises, to conform to the grade established by ordinance of common council entitled "An ordinance to change the grade of a portion of Lamberton and Ferry streets, and to widen Bridge street, between Union and Warren streets, also to vacate a portion of Bridge street," passed February seventeenth, eighteen hundred and ninety-one; that deponent
13 went to said premises on said day, taking several officers with him; that deponent called on the said John McQuade, in his house on said premises, and informed him by whose orders he was there and for what purpose he was there; that the said John McQuade then and there told this deponent that he, McQuade, ignored the orders of the mayor and president of the board of public works and chief of police and any other city authority; that he, McQuade, would not allow any one to go to work there relaying his pavement and resetting said curb and gutter; that when deponent met McQuade on his said premises as aforesaid the said McQuade had a pitchfork in his hand; that when the men went to work to relay said pavement and reset said curb and gutter as aforesaid, the said John McQuade shoved and pushed three or four of the men so at work; that he also cut the cord or plumb line that was stretched along the curb to give the grade; that deponent then and there placed the said McQuade under arrest, and sent him to the second district police station in charge of an officer; that the said McQuade immediately procured bail and returned to said premises in about a half an hour after the time of his arrest as aforesaid; that while the men proceeded with their work of relaying said pavement and curb and gutter they were interfered with by persons in the house of said John McQuade throwing water on the men from the upstairs windows, and that to enable the men to proceed with their work and prevent themselves being deluged with water, they stretched a canvass over their heads on poles while the said work was progressing.

WM. HARTMAN.

Sworn and subscribed before me, this thirteenth day of March, A. D. 1894.

G. V. PACKER,
Notary Public for N. J.

14 An ordinance to change the grade of a portion of Lamberton and Ferry streets and to widen Bridge street, between Union and Warren streets, also to vacate a portion of Bridge street.

Whereas, the Pennsylvania Railroad Company, lessee of the United New Jersey Railroad and Canal Company, in pursuance of authority conferred upon them for that purpose by the legislature of this State, are engaged in widening their railroad in the city of Trenton and making a four-track road thereof through said city; and whereas, the said changes in the said railroad cannot be properly made unless the grade of a certain portion of Lamberton and Ferry streets be altered and also certain portions of Bridge street be vacated as hereinafter provided; and whereas, the said changes in the said railroad will promote the interests of the said city of Trenton; and whereas, the said Pennsylvania Railroad Company have agreed with the Inhabitants of the City of Trenton that they will furnish and pay for the labor and materials necessary to make the said alterations, and to indemnify them against any expenses or losses that may be incurred as damages to property affected, or otherwise, by the said change of grades and the said vacation of portions of said street; now, therefore,

The Inhabitants of the City of Trenton do ordain:

Section 1. That the grade of a portion of Ferry street, beginning at a point in the north curb-line of said street, at a distance of 118.5 feet west from the west curb-line of Lamberton street, at an elevation of 72.17; thence ascending eastwardly, with a grade of six feet per hundred, for a distance of 118.5 feet to the west curb-line of Lamberton street, where the elevation will be 79.28; thence across Lamberton street to the east curb thereof, where the elevation will be 80.70; thence de-cending eastwardly, with a grade of three feet per hundred, for a distance of 128 feet to a point in the present curb-line of Ferry street, where the elevation will be 76.86; also beginning at a point in the south curb-line of Ferry street, at a distance of 97 feet west from the west curb-line of Lamberton street, where the elevation will be 72.14; then ascending eastwardly,
15 with a grade of six feet per hundred, for a distance of 97 feet to the west curb-line of Lamberton street, where the elevation will be 77.96; thence ascending eastwardly, with a grade of about three feet per hundred, to a point in the south curb-line of Ferry street, 23 feet east from the east curb-line of Lamberton street, where the elevation will be 80.00; thence descending, with a grade of three feet per hundred, for a distance of 105 feet to a point in the south curb-line of Ferry street, where the elevation will be 76.85.

Also to change the grade of a portion of Lamberton street, beginning at a point in the west curb-line of said street about 831 feet south from the southerly curb-line of Market street, where the elevation will be 76.00; thence ascending southerly, with a grade of eight feet per hundred, a distance of 175 feet to a point 12 feet north from the north end of a proposed new bridge, where the elevation will be 90.0; thence crossing the proposed bridge, with a vertical curve, to a point on the south side thereof, where the elevation will be 89.6;

thence descending, with a grade of eight feet per hundred, a distance of 129 feet to the north curb-line of Ferry street, where the elevation will be 79.28; thence crossing Ferry street to the south curb thereof, whereof the elevation will be 77.96; thence descending, with a grade of seven feet per hundred, a distance of 60 feet to a point in the present west curb-line of Lamberton street, where the elevation will be 73.76; also beginning at a point in the east curb-line of Lamberton street, about 831 feet south from the southerly curb-line of Market street, where the elevation will be 76.00; thence ascending southerly, with a grade of eight feet per hundred, a distance of 175 feet to a point on the north end of a proposed new bridge, where the elevation will be 90.0; thence crossing the proposed bridge with a vertical curve to a point 18 feet south from the south end thereof, where the elevation will be 90.0; thence descending, with a grade of eight feet per hundred, a distance of 116.25 feet to the north curb-line
16 of Ferry street, where the elevation will be 80.7; thence crossing Ferry street to the south curb thereof, where the elevation will be 79.31; thence descending, with a grade of seven feet per hundred, a distance of 66 feet to a point in the present east curb of Lamberton street, where the elevation will be 74.69, be and the same is hereby changed.

SECTION 2. That the following portions of Bridge street be vacated, namely: No. 1. Beginning at a point on the north side of Bridge street, $36\frac{8}{10}$ feet westerly from the west side of Union street, and $12\frac{7}{10}$ feet distant from the centre line of said railroad company's proposed new tracks; thence parallel with and $12\frac{7}{10}$ feet distant from said centre line, with a radius of $1,885\frac{5}{10}$ feet, a distance of $162\frac{5}{10}$ feet to the east side of Decatur street; thence north, one degree sixteen minutes east, $24\frac{5}{10}$ feet to the fence along the present tracks of the said railroad company; thence along said fence north, 78 degrees 44 minutes east, $53\frac{7}{10}$ feet, and south, nine degrees 42 minutes east 3 feet, and north, eighty degrees 18 minutes east, $24\frac{5}{10}$ feet, and south, 89 degrees 55 minutes east, $82\frac{2}{10}$ feet to the place of beginning. No. 2. Beginning at a point on the west side of Decatur street and the fence along the said railroad company's present tracks; thence along the west side of Decatur street south, one degree 16 minutes west, $24\frac{5}{10}$ feet; thence parallel with and $12\frac{7}{10}$ feet distant from the said new centre line of said railroad company's proposed new tracks, with a radius of $1,885\frac{5}{10}$ feet, a distance of 141 feet to the east side of Warren street: thence along the east side of Warren street north, one degree 30 minutes east, $24\frac{4}{10}$ feet; thence along the fence along the present tracks of said railroad company north 82 degrees 56 minutes east, 140 feet to the place of beginning. No. 3. Beginning at the southwest corner of Warren and Bridge street; thence along the south side of Bridge street north, 88 degrees 19 minutes west, $228\frac{4}{10}$ feet, and south, 62 degrees 30 minutes west, $12\frac{2}{10}$ feet, and south 49 degrees 32 minutes west $19\frac{6}{10}$ feet to the east side of Fair street; thence along the east side of Fair street north, one degree 12 minutes east, $32\frac{3}{10}$ feet to the stone wall along
17 the present tracks of said railroad company; thence along the stone wall north, 89 degrees 11 minutes east $253\frac{7}{10}$ feet to

the west side of Warren street; thence along the west side of Warren street south, one degree 30 minutes west, $24\frac{6}{10}$ feet to the place of beginning.

All the said change of grades and vacation of portions of said streets are to be made in strict conformity with the profiles of said changes of grade, submitted with the applications of the Pennsylvania Railroad Company, and dated December 29th, 1890, and January 27th, 1891, and numbered 4573 and 4584, respectively, and in accordance with a plan of said vacation of portions of said street, dated June 3d, 1890, numbered 4276, made by the said Pennsylvania Railroad Company, and now on file in the office of the city surveyor, and the city surveyor is hereby directed to record each of the grades and lines hereby changed in the street book; and the Pennsylvania Railroad Company are authorized to erect an iron bridge over their four tracks on the line of said Lamberton street in accordance with plans made by the Pennsylvania Railroad Company and numbered 4572, now on file in the office of the city surveyor, provided that the said Pennsylvania Railroad Company will at its own expense lay out, grade, curb, pave and dedicate a new street thirty (30) feet wide between Warren and Fair streets, and will widen Bridge street, between Union and Warren streets, to a width of not less than thirty-five (35) feet, as shown on a plan dated June 3, 1890, made by the Pennsylvania Railroad Company and now on file in the office of the city surveyor, and will dedicate the part so widened to the city of Trenton, and will provide means to carry off all the surface waters whose present course will be diverted or changed by the aforesaid alteration and changes in said streets, and provided the said Pennsylvania Railroad Company will file with the city solicitor a satisfactory agreement with the Inhabitants of the City of Trenton, that they will furnish and pay for the labor and materials necessary to make the said alterations, and indemnify the said Inhabitants of the City of Trenton against any ex-
18 penses or losses which may be incurred as damages to property affected or otherwise by the said changes of grades and said vacation of portions of said street, which could be enforced against the city by suit, and shall within thirty (30) days after the passage hereof file a satisfactory bond with the city solicitor for the faithful performance of said agreement before mentioned; and this ordinance shall not go into effect until the said bond is filed and the expense of the passage of this ordinance is paid.

Passed common council, Feb. 17, 1891.

GEO. R. WHITTAKER, *President.*

Attest: JNO. C. OWENS.

Approved Feb. 21, 1891.

A. A. SKIRM, *Mayor.*

I, Charles J. Fury, city clerk of the city of Trenton, and keeper of the records of the common council thereof, do hereby certify that the foregoing is a true copy of an ordinance of said city duly passed by the common council thereof, on February seventeenth, eighteen

hundred and ninety-one, and approved by the mayor of said city on February twenty-first, eighteen hundred and ninety-one, entitled "An ordinance to change the grade of a portion of Lamberton and Ferry streets, and to widen Bridge street, between Union and Warren streets, also to vacate a portion of Bridge street," as the same remains of record in my office.

In testimony whereof, I have hereunto set my hand and affixed the common seal of said city of Trenton, this twelfth day [L. S.] of March, eighteen hundred and ninety-four.

CHAS. J. FURY, *City Clerk.*

A true copy.

ALLAN L. McDERMOTT, *Clerk.*

19 *Answer.*

The answer of John McQuade to the bill of complaint of the Inhabitants of the City of Trenton.

This defendant, John McQuade, to the bill of complaint of the Inhabitants of the City of Trenton, or to so much thereof as this defendant is advised it is material or necessary for him to answer, answering says:

I. That he admits that the complainants are a municipal corporation, as set forth in the bill of complaint.

II. That he admits that the common council of the city of Trenton, on or about the seventeenth day of February, eighteen hundred and ninety-one, did pass an ordinance entitled "An ordinance to change the grade of a portion of Lamberton and Ferry streets, and to widen Bridge street, between Union and Warren streets, and also to vacate a portion of Bridge street," in said city of Trenton, and that said ordinance was approved by the mayor of said city and published, as in said bill of complaint mentioned.

III. And this defendant further answering says, that he has no information or knowledge concerning the allegations in said bill of complaint that the change of grade of Lamberton and Ferry streets, as set forth in said bill of complaint, was made and that said ordinance was passed at the special instance and request, or by the procurement of the Pennsylvania Railroad Company upon the terms and conditions in said bill of complaint set forth, save the information and knowledge conveyed to this defendant by the allegations in said bill of complaint, and the recitals contained in the aforesaid ordinance and common rumor, and that therefore this defendant can neither admit nor deny such allegations in said bill of complaint made, but leaves the complainants to make such proof thereof as they may be advised is necessary.

IV. And this defendant further answering says, that he
20 admits that the grades of the said Ferry and Lamberton streets, since the passage of the aforesaid ordinance, have been altered, and that the Pennsylvania Railroad Company has dedicated a new street between Warren and Fair streets, and widened Bridge street between Union and Warren streets, and dedi-

cated the part so widened to the city of Trenton, but this defendant has no information or knowledge, other than what has come to him through the allegations contained in the said bill of complaint and through common rumor, that the said Pennsylvania Railroad Company, at the time of making the said change of grade, did pay the expense thereof, or that said company did file with the city solicitor a satisfactory agreement and bond with the Inhabitants of the City of Trenton that it would furnish and pay for the labor and materials necessary to make said alterations and indemnify the said city against any losses or expense which might be incurred as damages to property affected by said change of grades, or that said company paid the expense of the passage of said ordinance, including its printing and publication, or that said company performed all and singular the things on said company's part required to be done before said ordinance should have force and effect, and therefore this defendant can neither admit nor deny such allegations made in said bill of complaint, and leaves the complainants to make such proof thereof as they may be advised is necessary.

V. And this defendant further answering says, that he denies the allegation in said bill of complaint contained that said Pennsylvania Railroad Company provided means to carry off all surface water, the course of which was diverted or changed by the alterations made as aforesaid in said Ferry and Lamberton streets, and on the contrary, says that the provisions made for carrying off said surface water are utterly inadequate, and this defendant's property, in consequence of the inadequate provisions made as aforesaid, has, in a time of heavy rain, been damaged by the overflow of water into defendant's cellar from the street in front of this defendant's house and lot.

VI. And this defendant further answering says, that he
21 admits that he owns and occupies the house and lot on the northerly side of Ferry street, in said city of Trenton, as in said bill of complaint mentioned.

VII. And this defendant further answering says, he admits that some time in the month of June, eighteen hundred and ninety-two, Joseph R. Gilkyson, in said bill of complaint mentioned, by his workmen and employees, did reset and relay the pavement and curb in front of this defendant's property, and that the same was done without the consent of this defendant and against his protests and his efforts to prohibit the same; but that this defendant has no information or knowledge, other than that conveyed to him in and by the said bill of complaint, as to whether such work was done by said Gilkyson and his workmen and employees under the authority of the street commissioner of the city of Trenton, or otherwise, and can therefore neither admit nor deny this allegation in the bill of complaint contained, and leaves the complainants to make such proof thereof as they may be advised is necessary.

VIII. And this defendant further answering says, that he admits that after the said pavement upon the sidewalk in front of his premises was relayed as aforesaid, and after said curb was reset as aforesaid, this defendant did take up said pavement and remove said

curb, and that the said pavement has not since that time, been relayed.

IX. And this defendant further answering says, that the facts and circumstances connected with the attempt to alter the grade of Ferry street, in front of this defendant's house and lot, and to relay the curb and pavement upon the sidewalk in front of this defendant's house and lot, relating to the same matters complained of — the said bill of complaint, are as follows:

That, prior to the passage of the aforesaid ordinance, this defendant had erected houses upon the lots owned by him and fronting on said Ferry street, in accordance with the grade of said Ferry street, as the same had been established by the municipal authorities of the city of Trenton; that the said grade had a descent in front of
22 his property from east to west, and on beyond his property to the Trenton water power, into which *were* discharged the surface water flowing through said street; that about the time of the passage of said ordinance, the Pennsylvania Railroad Company, being desirous of widening its road-bed so as to permit of the laying of a four-track road, built over its tracks in the line of Lamberton street, for the use of the public, an elevated bridge; that in order that said elevated bridge might be accessible, it was necessary to build approaches thereto by depositing in Lamberton street and in Ferry street, in front of the property of this defendant, large quantities of dirt, and to the end that said Pennsylvania Railroad Company might construct said elevated bridge in Lamberton street, the said ordinance was passed, purporting to make a change or alteration in the portions of Lamberton and Ferry streets adjacent to said elevated bridge, but this defendant is advised, and therefore insists, that the changes of grade attempted to be authorized by said ordinance were in no proper or legal sense such a change or alteration of grades of the streets as is authorized by the charter of the city of Trenton or by any law of this State, but that the alteration attempted to be authorized by the said ordinance was a work relating to, and only to, the construction of approaches to the said elevated bridge, and therefore was a work incidental to the construction of said elevated bridge, and not a matter over which the said common council could legally exercise any authority whatsoever, by ordinance or otherwise.

X. And this defendant further answering says, that by the attempted alteration of the grades as aforesaid, the surface water in times of heavy rain does now, instead of passing through the street in front of this defendant's property from east to west to the water power as it formerly did, is now caused to accumulate in the said street immediately in front of this defendant's property, the grades of the street descending in both directions to a lowest point in front of this defendant's property, and that said surface water, in
23 times of heavy rain, is likely to overflow the sidewalk and to flow into this defendant's cellar, and thereby doing great damage.

XI. And this defendant further answering says, that if the sidewalk in front of this defendant's property be raised to the grade

mentioned in the aforesaid ordinance the cellar windows of the house in which this defendant resides will be closed up, or practically so, and this defendant will be denied his right to light and air in the cellar of his said house; and further, that this defendant's free access from his said property to the said street will be greatly impaired.

XII. And this defendant further answering says, that he is advised and, therefore, will insist that even if the allegations in said bill of complaint are all true, it appears thereby that the attempted alteration of the grade aforesaid in said Lamberton and Ferry streets, and especially in front of this defendant's property, is a work carried on by, at the expense of, and for the sole benefit of the Pennsylvania Railroad Company, and that said company have no power or authority under the law to do the said work, and thereby damage the property of this defendant, without first making compensation to this defendant for the damage or loss which he will sustain by reason of the said work, and that he has the right to prevent the completion of the said work until he shall have received full compensation for all damages which he will sustain by the said work; and this defendant further submits that the complainants are not entitled to the relief prayed for in their bill of complaint, and this defendant asks that he may have the same benefit of this defense as if he had demurred to the said bill of complaint for want of equity therein.

And this defendant further answering says, that he is advised and, therefore, will insist that by the allegations contained in the said bill of complaint, it appears that the complainants have no interest in the subject-matter of said bill of complaint, and this defendant prays that he may have the same benefit of this defense as if he had demurred to said bill of complaint for want of equity therein.

24 And this defendant further answering says, that he is advised and, therefore, will insist that under the constitution of this State he has the right to free *excess* to said Ferry street from his said property fronting thereon, and to the free admission into his house fronting on said Ferry street of light and air from said street; and further, that no alteration in the grade of said street in front of his property and no exclusion of light and air from his said house can be lawfully made unless and until a proper method of procedure shall have been prescribed by the legislature of this State for the exercise of the power of eminent domain, whereby this defendant may receive proper and adequate compensation for the damage that will result to him by such alteration of grades and exclusion of light and air, and this defendant prays that he may have the same benefit of this defense as if he had demurred to the said bill of complaint for want of equity therein.

All which matters and things this defendant is ready to maintain, aver and prove, and prays to be hence dismissed with his cost in this behalf most wrongfully sustained.

——— ———.

STATE OF NEW JERSEY, } ss.:
County of Mercer, }

John McQuade, of full age, being duly sworn according to law, on his oath says, that he is the defendant mentioned in the foregoing answer; that the same has been read to him, and he knows the contents thereof; that the said answer is true, except as to matters stated to be on information and belief, and as to such matters he believes it to be true.

And this deponent further says, that prior to the passage of the ordinance mentioned in the bill of complaint filed in this cause, the grade of Ferry street in front of the property owned by this deponent was a descending grade from east to west, and that the surface waters flowing through the gutters of said street were discharged into the Trenton water power; that after the passage of the said ordinance the Pennsylvania Railroad Company erected a
25 bridge over its tracks in Lamberton street at such great height as to necessitate the building of approaches thereto in order to make the same accessible; that the changes of grade attempted to be authorized by the said ordinance were designed only for the purpose of fixing the grade of the approaches to the said elevated bridge; that, if the sidewalk in front of this deponent's property be constructed on the grade of said approaches to said elevated bridge, the cellar windows of the house in which this deponent resides will be almost completely buried beneath the surface of the sidewalk, and the light and air thereby excluded from this deponent's property, and that the stoop leading to the front door of this deponent's house will also be partially buried beneath the surface of the sidewalk.

And this deponent further says, that the work of constructing the said approach to said bridge in front of this deponent's property has been done with this deponent's consent, and against his most vigorous protests and his active efforts to prohibit it, and that no estimate under or pursuant to any legal proceedings whatsoever of the damages he will sustain by reason of the construction of the said approach and the alteration of said grade has ever been made, and that no agreement has ever been made concerning said damages between this deponent on the one hand and the complainants or the Pennsylvania Railroad Company on the other, and that this deponent has never received, either from the complainants or from the Pennsylvania Railroad Company, any compensation for such damages.

——— ———.

Sworn to and subscribed before me, this — day of April, A. D. 1894.

——— ———.

Mr. John Rellstab for the complainant.
Mr. R. S. Woodruff and Mr. W. M. Lanning for the defendant.

Transcript of shorthand notes in the above-stated cause taken before his honor John T. Bird, V. C., at the state-house, in Trenton, N. J., on November 28th, 1894.

Mr. RELLSTAB: It is agreed that the affidavits annexed to the bill of complaint and the answer may be used on the argument at final hearing with the other proofs offered at the final hearing.
Mr. LANNING: That is correct.

JOHN MCQUADE, being duly sworn in his own behalf, testifies as follows:

Direct examination by Mr. LANNING:

Q. You are the defendant in this case?
A. Yes, sir.
Q. You are the owner, I believe it is admitted, of two houses on Ferry street, are you not, in front of which the work spoken of in the pleadings was done?
A. Yes, sir.
Q. Do you remember the occasion of the passage of an ordinance authorizing the grading, or pretending to authorize the alteration of the grade of Ferry street?
A. Yes, sir.
Q. That was passed, I think, by the common council or board of works; which?
A. Common council.
Q. Did you attend any meeting of the common council when that matter was before them for consideration?
A. Yes, sir.
Q. For what purpose?
A. To object.
27 Q. Did you object?
A. Yes, sir; I did.
Q. Before the common council?
A. Yes, sir.
Q. Objected to what?
A. The changing of the grade on Ferry street.
Q. Subject to the passage of the ordinance did you at any time make any objections to the alterations of this grade?
A. I did.
Q. State whether you made any objections between the time of the passage of the ordinance and the beginning of any work upon that street?
A. They were in contemplation of making a new street on the north of the railroad, and abandoning changing these grades, and

I went around with Mr. Calwell to get signatures to that paper objecting to the change of the street.

Q. Was that before any change was made?

A. It was after the ordinance was passed.

Q. But before any alteration in the grade of Ferry street was made?

A. Yes, sir; before; I may say also that they abandoned this proposal; they tried it, I was in favor of it, but they came back to the original plan, the change of the grade.

Q. What I want to know is whether you at any time made any objection to the changing of the grade and the work on Ferry street before the ordinance?

A. I did; Mr. Bowles came to me.

Q. Who is he?

A. Agent of the railroad company.

Q. What was his position?

A. I believe he was engineer for the railroad.

Q. You mean the Pennsylvania railroad?

A. Yes, sir.

Q. You went to Mr. Bowels?

A. No, sir; he came to me.

Q. Was that before any work was done; I am speaking of any work on your property?

28 A. Before any work was commenced.

Q. What was said?

A. He said he wanted to see me; I was present at the time and went to his office and he told me that they were going to make this change, and I told him I was sorry; I told him I would rather they would open the other street, but he came to that conclusion he said and he asked what I would want; I told him that I could not tell him at that time; he said something about $500; I said he might as well offer me 500 cents; and a few days afterwards I met him on Centre street.

Q. Mr. Bowles?

A. Yes, sir; and he asked me if I had made my mind up; I said I wished they would not make that change, but as long as they were going to do it I wanted $3,000; he said they would not give that much; I said Do not touch anything that belongs to me, and since that they have commenced; they were coming to the raise at the junction of Ferry and Lamberton streets——

Q. Was that pipe used?

A. Previous to this change of grade, so that when they would change the grade they would be ready to conduct the water.

Q. In front of your property?

A. Not in front of my property; it was constructed on the south side of the street; I live on the north side of Ferry street, and when it came across the street I was absent; I told the men not to disturb the gutter-stones and the street outside the gutter-stones, not to touch them; I would not allow it.

Q. You told the men that were at work?

A. Yes, sir; and so when they were laying or beginning to lay

this pipe across the street; they had come up as far as the water power, and begun there at my place.

Q. Did you at any time later make any objection to the work?

A. I did; I would not allow them to put it in.

Q. Put what in?

29 A. The inlet that was to receive this water and this pipe; Mr. Bowles came to me and he said (interrupted)——

Q. At this time, when you would not allow them to put in the inlet, had any alteration in grade been yet commenced?

A. None whatever.

Q. Did you subsequently make any objections?

A. I made it all the time up to the present moment.

Q. When they attempted to make any alteration in the grade in front of your house, did you make any altercation?

A. That was on the seventeenth of June, 1893; that was eighteen months afterwards.

Q. That was when the pavement was laid?

A. Yes, sir; when they raised the pavement.

Q. At that time what did you do?

A. I resisted then, did I not?

Q. There were men working there?

A. They came and was tearing off my bricks, and I objected to that.

Q. What men were they?

A. Railroad company.

Q. Italians?

A. Yes, sir; they were in charge of a young man named Mertit, I think, and he and I had a little collision about it, and we pulled one another around the sidewalk, and I told him I didn't want the bricks torn up, and I went uptown to get a warrant for assaulting me, and he came to get one for me, and by the time I got back the bricks were removed.

Q. The bricks that were on either side of the sidewalk were removed?

A. Yes, sir.

Q. The sidewalk through the middle were stone and bricks on the sides of the stone?

A. Yes, sir.

Q. The bricks were torn up, but the grade was not changed?

A. That was 11 o'clock, I think, but by the time I got back

30 the bricks were removed—I don't know where, for about 2 o'clock, the first notice I had of it Captain Hartman came in and said he was sent down by the authorities to prevent me from interfering with those men in doing that work.

Q. Captain Hartman was a policeman here and had charge of a lot of men?

A. Yes, sir; and restrained me from interfering with the men.

Q. What did you do?

A. Cut the line that they had in setting and resetting the curbstone, and they put me under arrest; I was taken out to the station-house, and gave bail to appear; by the time I came back there was

water-throwing; I think they were changing the grade in front of my place; flagstones were all out, and raising it with dirt.

Q. Then, at the time you now speak of, the alterations in grade had partly been made on June 17th?

A. On June 17th they commenced to change the grade.

Q. On June 17th they commenced to change the grade of the sidewalk?

A. Yes, sir.

Q. Previous to June 17th, had they already altered the grade of the streets between the curbs?

A. No, sir.

Q. I mean the street itself?

A. No, sir; certainly not; the grade certainly never came any farther than where it was intended it would on the sidewalk and the sidewalk neither was changed; neither was the street.

Q. Was the grade of Ferry street which formed the approach up to the bridge altered before June 17th?

A. To where the grade is now on the sidewalk; no, sir.

Q. Had any dirt been put in the street prior to that time, prior to June 17th?

A. Not to where the grade is changed now; it was shortened 21 feet by resolution; the grade came no farther than where it was put in by resolution.

Q. Then I understand you to say you commenced your
31 objection to this proposed resolution with common council before they passed the ordinance?

A. I have; yes, sir.

Q. And that you continued making objections from that time on?

A. I did; yes, sir.

Q. As you said "to the present moment"?

A. Yes, sir.

Q. At any time during this contest have you removed any portion of the sidewalk in front of your house?

A. Yes, sir.

Q. What portion?

A. Flagstones.

Q. That is the flagstones running through the middle of the sidewalk?

A. Yes, sir; I disturbed that the seventeenth of June, and because the railroad company succeeded in changing the grades they had thrown water on them and so on from the house that time of removing the flagstones and disturbing the curbstone, and the flagstones remained until the seventh of March, and on the seventh of March, 1893, I removed them into my yard.

Q. Did you ever remove the bricks on the other side of the grade which formed the sidewalk?

A. No, sir; they never were removed.

Q. You spoke a moment ago of having been taken away, when you got back they were gone, that was the original sidewalk before any alteration?

A. Yes, sir; and the bricks have never been laid on the sidewalk since.

Cross-examination by Mr. RELLSTAB:

Q. When did you appear before common council in reference to changing the grade?

A. During the contemplation of these changes.

Q. Can you give the date?

A. No, sir.

Q. Did you appear more than once?

A. I believe I was there several times; I spoke myself in opposition to it.

32 Q. Did you speak more than once?

A. No, sir; there were several propositions before common council in reference to change of grades in order to allow the railroad company to lay the four-track system.

Q. Through the city of Trenton, was there not?

A. Yes, sir.

Q. There was one that contemplated the vacation of a portion of Lamberton street; is that so?

A. Yes, sir; I think so.

Q. Was it not that one you spoke against, the one that contemplated the vacation of part of Lamberton street?

A. I did also speak before that.

Q. Did you speak more than once?

A. No.

Q. Then your objection was to that contemplated change, which meant the vacation of part of Lamberton street?

A. Yes, sir.

Q. As a matter of fact you appeared only before common council once and spoke against the proposed change of grade?

A. Yes, sir.

Q. And that proposition was before common council at the time it was considering that plan, which meant the vacation of Lamberton street, a portion of it?

A. I think that was not the case; it was about the raising of the bridge that I objected to.

Q. Are you sure?

A. I think so.

Q. At any rate, you went before the common council and spoke against the attempted change once; the first change was in reference to the vacating and changing in Lamberton street, was it not?

A. Yes, sir.

Q. If that plan had been carried out, there would have been no change in the grade over Ferry street on Lamberton street, reaching the present bridge, would there?

A. The grade would have been the same.

33 Q. The grade would have been the same if they hadn't raised the bridge?

A. Of course, then, not; what I wanted was not to disturb Ferry street where I live.

Q. The change of grade as actually consum-ated meant the raising

of the street toward the bridge on Lamberton street, crossing the railroad and extending below Ferry street, did it not?

A. Yes, sir.

Q. And that necessitated the building of that embankment on Ferry street north toward Ferry street toward you- premises?

A. Westerly.

Q. Easterly?

A. Yes, sir; you are right.

Q. At any rate it was an approach towards your premises?

A. Yes, sir.

Q. The change of grade then actually down on Ferry street is from Lamberton street toward your house?

A. Yes, sir; they diverted the course of the water which used to cross Lamberton street on the surface; now the water comes east and west, from east and west right to where I live.

Q. Ferry street is sloping, isn't it, from Broad street toward the river?

A. Yes, sir.

Q. And the grade is downward, or there is no grade; it is downward in front of your premises?

A. Yes, sir.

Q. And this change of grade on Lamberton, approaching the bridge, made such a change on Ferry street that there was a slight hill descending from Lamberton street towards your premises?

A. Yes, sir.

Q. And which, of course, would cause the surface water to accumulate in front of your premises?

A. Yes, sir.

Q. To carry off which there was a trunk across Lamberton?

34 A. Yes, sir.

Q. The iron pipe was laid before the dirt was thrown there?

A. Yes, sir.

Q. What portion of this work of which the change of grade in Ferry street is part, was done first, do you remember?

A. What is that?

(The stenographer being requested, read the previous question, as follows:) "What portion of this work of which the change of grade in Ferry street is part, was done first, do you remember?"

A. The change of the grade, I think, was commenced from the bridge downwards; I did not pay much attention to it at that time; not particularly what they were working at.

Q. At what stage of the work—the entire work now—did you remonstrate concerning the change to be made?

A. I remonstrated all along from the very beginning; I said that first.

Q. You include in that sort of remonstrance your appearance before common council?

A. Yes, sir; and that and subsequent with Mr. Bowles, and during the whole time when they commenced and put their pipe in there; I objected, too, when they commenced to raise the sidewalk; I objected worse by throwing water.

Q. They objected too in the shape of notice not to disturb any portion of your property?

A. My objection was till they compensate me for these damages.

Q. Were you in your premises when the water was thrown upon the workmen?

A. I was arrested, when I came back the water was throwing.

Q. Was there any water-throwing before you were arrested?

A. No, sir.

Q. Were you in and about the premises before you were arrested; inside I mean?

35 A. I know there was no water thrown before I was arrested.

Q. How do you know?

A. I was there; I would see it for I was there.

Q. Didn't you assist actively in the accumulation of water in the second floor?

A. If I did I wouldn't deny it, for I saw it thrown and I was satisfied to have it thrown, too.

Q. Didn't you ask or direct it to be thrown; didn't you know preparations were being made to throw it?

A. I did not; the water was so throwing when I came back; I never knew there was any contemplation of throwing water.

Q. Didn't you threaten them, saying water would be thrown if they attempted it?

A. I did not.

Q. Didn't you threaten bodily harm to the workmen if they attempted any change to the work?

A. I didn't attempt any bodily harm.

Q. Did you say you would use physical force?

A. I could not use much.

Q. Didn't you threaten to?

A. I don't say I didn't; I might; I do not know hardly.

Q. Did you at any time agree to take a certain sum of money in the way of damages or compensation for the change of grade?

(Objected to.)

By the COURT: He already has said that he told them that he would take $3,000.

By Mr. RELLSTAB: I think I have a right to go into that subject.

By the COURT: I do not think so if in the way of a compromise.

By Mr. RELLSTAB: The object of my question is not to bring out anything that would show a compromise.

A. The city of Trenton never offered me $1.

36 By Mr. LANNING: It is very evident, I submit, that whatever conversation may have been had with Mr. McQuade must have been by way of compromise, and could not have been anything else; in addition to that it would be dealing in matters relating to real estate which must be in writing.

By Mr. RELLSTAB: I do not think that is required; I do not know as it is material, but I think if we could show that an actual sum had been agreed upon between Mr. McQuade and the agents of the Pennsylvania railroad——

WITNESS: You can't show that.

By Mr. RELLSTAB: And acted upon the faith of such an agreement, the work so progressing that it would be material.

By the COURT: If you can show anything that amounts to a consent upon his part you may show that.

By Mr. LANNING: Then we will object to the question on the ground that it is not cross-examination, and the counsel must be bound by the answer.

By Mr. RELLSTAB: They have opened the subject of compensation in the demand by him for $3,000.

By the COURT: I should allow it upon the ground that the examination so far has proceeded upon the idea that he objected and resisted because there was no agreement whatsoever. The ground of his resistance was total want of arrangement between himself and the city or himself and the company. He objected all the time. If there is anything that shows a consent, whether by way of agreement for money or any other arrangement, anything that shows a consent upon the part of this witness, the defendant, to the company's proposal, that may be shown.

37 By Mr. RELLSTAB: You have testified that you know Mr. Bowles, engineer for the railroad company?

A. Yes, sir.

Q. Do you know Joseph R. Gilkyson?

A. I do.

Q. Did you have any conversation with him in reference to compensation paid to you?

A. For what?

Q. For the damage you may sustain; for where the grade is changed to now.

A. This particular change of grade?

Q. I mean this particular one.

A. I want to know what one.

Q. The change of grade contemplated by this ordinance and which raises a portion of the grade in front of your premises as it is now made.

A. We never had an agreement as it is now.

Q. Did you ever have any talk with him in reference to the amount you would be satisfied with?

A. With whom?

Q. Mr. Gilkyson.

A. No; not where it is now.

Q. Not where the grade is now; this grade as you speak of, it now is the only change of grade that has been made in front of your premises, is it not?

A. It is the only one, that is, now; they shortened it by resolution 21 feet.

Q. I do not know anything about that; when was this conversation, if you remember?

A. Never was any.

Q. Never was any?

A. Not where it is now.

Q. Did you never agree that that work should be done and that you would accept as compensation for all damages that you might sustain by reason thereof the sum of $250?

A. No, sir.

(Objected to on the ground that it partakes of the nature of a compromise, and on the ground that it is illegal under the statute of frauds, not being in writing.)

38 By the COURT: I will allow these questions upon the idea that he never went on and finished it.

Q. Did this work under this arrangement——

By Mr. LANNING: Do I understand the objection is overruled?

By the COURT: The objection is overruled.

By Mr. RELLSTAB: Did you ever agree with Mr. Gilkyson to accept $250 as your damages or compensation for any change of grade at or about your premises?

By Mr. LANNING: This question is objected to for the same reasons already given.

(Objection overruled.)

By the COURT: Let the witness answer.

Question repeated.

A. At the time I drove them off from where they came to put it in where it is now at the present time, I said it would bar my property of light and air, and if they would shorten the grade I would take less; I suppose they asked me what I wanted; they said it was hard to deal with me, and Mr. Bowles had to get Mr. Mitz and Mr. Crulp to come down to look at the place; I do not know whether Mr. Gilkyson was there at the time; I think he was and we agreed to shorten the grade 21 feet and they asked me what I wanted; I said I didn't know, I said I think $500 and they said Give him $300, and we talked along and I said All right, come ahead.

Q. Come ahead at what figure?

A. Something about that $200 or $300; I don't know what, in fact I disallowed it; they passed that night, I think, a resolution to shorten that grade 21 feet, and after that they commenced to take the pipes up and have them laid where I was across the street, and afterwards commence- to build an inlet at this grade; I went to

39 Mr. Bowles and I said, This of course is by resolution and not legal, if you put that in there you are destroying my view on this street by reason of it; I am advised that this inlet, the opinions of reputable physicians that lives in the neighborhood have told me, Dr. Mackenzie and Gallagher, told me it is unhealthy; it was put in about one-half on me and half on Mr. Goff; I said If you put that in there I will require as much as Mr.

Goff does, it was on both, or I will take $100 less than he will; he said Why do you ask that now; I said I do not want to be fighting all the time and you must not trouble and annoy us, and I said If you will agree to give me that I will allow you to go in there; he said he though- he would not do it; I said If you do not you can pay it in future time; I said You can pay us here for $3,000; he put it in the short grade at any rate; this was in 1891 when I am talking about.

Q. You are giving before the seventeenth of June?

A. About November; I think it was in 1891; on the thirtieth of April, 1892, I met Mr. Bowles and I asked him what he was going to do now about this, finishing up the street; What are you going to do, he said, about it, What are you going to do about it, I said; I said I am going to take it out if you do not pay for it; he said Don't touch it; this was the thirtieth of April, and I think on the fourth of May, a few days afterwards, I took it out from where it was put in by resolution, and it remained out until the seventh of May, when it was so shortened, and they put it back and extended the grade again.

By Mr. WOODRUFF: Didn't put it back in the same place?

A. Where they were originally put.

By Mr. RELLSTAB: Then it was not in reference to the change of grade authorized by the ordinance that you offered to take $250?

A. No, sir; it was only with a view of shortening the grade and bringing the commencement of the grade at the west end of the property.

Q. Where is it the present commences?

40 A. At the east end; that is right.

By Mr. WOODRUFF: And that would effect your property hardly any?

A. Hardly any, or very little, except the inlet and bad odor, and in the summer season particularly, when the water stagnates in what they call the check-basin.

Q. Shortened by resolution and not by ordinance?

A. Yes, sir.

By Mr. LANNING: By consent of counsel, we offer in evidence a couple of maps showing the grades of Ferry and Lamberton streets, in the immediate vicinity of this bridge and of Mr. McQuade's property. They are admitted without formal proof that they are copies of the city records, and are marked Exhibit M 1 and Exhibit M 2.

JOHN BROUGH, called by Mr. Lanning, after being duly sworn, testified as follows:

Examined by Mr. LANNING:

Q. Where do you live?

A. I live next door to Mr. McQuade, below him, on Ferry street; above him now.

Q. Do you know anything about the condition of the sidewalk in front of his house?

A. I know it was in a pretty bad condition for over a year.

Q. Do you remember the occasion when the sidewalk, bricks and flagging were taken up, on the original sidewalk?

A. I do, sir.

Q. Do you remember the occasion when the sidewalk was relaid on the sidewalk after the alteration of some of the grade?

A. As soon as they commenced—I am no man for law, so I walked away, and was away pretty much all the afternoon.

Q. Has the flagstone been relaid?

41 A. Yes, sir; the flagstone was relaid that day just as I came home at night.

Q. Since the grade has been changed, and since the bricks were originally taken up, have they ever been relaid?

A. No, sir; there has been no bricks relaid; there has been no bricks put down.

No cross-examination.

By Mr. RELLSTAB: I rely entirely upon your honor's opinion. I see no reason why there should be a change.

Conclusions.

(Filed March 26, 1895.)

Mr. R. S. Woodruff and Mr. W. M. Lanning for the complainant.

Mr. John Rellstab for the defendant.

On final hearing.

BIRD, *V. C.:*

The preliminary injunction in this case was advised, not because there was any question as to the legal rights of any of the parties in interest, but because those rights being conceded, the defendant thought proper instead of pursuing his legal remedies to recover compensation for the damages which he had sustained, or would sustain, by reason of the change of grade in the street and sidewalk, he persisted in taking the law in his own hands and bidding defiance to the city authorities. The city being liable to any of its citizens for damages sustained because of the want of repaired streets, and having undertaken to repair the streets according to the grade which had been prescribed as it lawfully might, and the de-

42 fendant with force and violence, interfering therewith and destroying such improvements or repairs from time to time, with repeated threats that he would continue such destruction, it appeared that such conditions were presented as justified the court in requiring him to desist from such destruction and interference. It seemed in such case as though the arm of the law would be wholly inefficient without the aid of equity. A single violent or illegal act may be corrected by an action at law, and so may a score, but when a multiplicity of illegal acts are threatened, it is to the interests of the public that equity should interfere in the beginning.

In this case it was not the duty of McQuade to make the change of grade, for the city had entered into an agreement with the company by which the company was to pay for all the expenses incurred in making such change. The city was proceeding to make such change. Consequently, McQuade was liable to no penalties, as his counsel has insisted, for lack of repairs or improvements in the street. It is plain, therefore, that the legal rights of McQuade could not be established by the city attempting to enforce any claim against him for want of repair of the streets or sidewalks adjacent to his premises. Such action or proceedings would not determine the damages which he had sustained or might sustain by reason of the change of grade.

Independently of the interference of the city authorities and what seems to be on their part the exercise of a legal right, the only question that can be litigated is the question between McQuade and the city with respect to the damages which he is entitled to. These damages he might have had ascertained before the company or the city took any steps whatever. But he allowed the company to go on and make all the changes necessary to the completion of the undertaking which had been consented to by the city, without taking direct proceedings to compel them to ascertain his damages and to compensate him therefor. But this inaction upon his part has not worked a forfeiture of his rights nor relieved the parties from
43 their liability. As was said when the preliminary injunction was advised, he has an ample remedy for a complete redress of all his grievances without interfering with the rights of the public at large, to the use of the street in front of his dwelling in a complete condition of repair. The cases referred to in the conclusions expressed when I granted the preliminary injunctions seems to me to sustain the views which have controlled me. See also Reed v. Camden, 24 Vroom, 322. I will advise that the injunction be made perpetual with costs.

Final Decree.

(Filed April 12, 1895.)

This cause coming on to be heard at the last regular term of the court of chancery, held at the state-house, in the city of Trenton, in the presence of John Rellstab, of counsel with the complainant, and Robert S. Woodruff and William M. Lanning, of counsel with the defendant, and the pleadings and proofs having been read, and the arguments of the respective counsel having been heard and considered, and the court having duly considered the said pleadings, proofs and arguments, and it appearing to the court that the complainant is entitled to the relief sought and prayed for by *him* in *his* bill of complaint, and that the preliminary injunction heretofore granted in this cause should be made perpetual: It is, on this ninth day of April, one thousand eight hundred and ninety-five, by Alexander T. McGill, chancellor of the State of New Jersey, ordered, adjudged and decreed, and the said chancellor, by virtue of the power and authority of this court, doth hereby order, adjudge and

decree that the defendant be perpetually enjoined and ref-rained not only from further interfering with the laying and completion of the sidewalk and curbing mentioned in the bill of complaint but
44 also from in any manner removing, disturbing or interfering with the said pavement, sidewalk or curbing after the same shall have been completed, and that a writ of injunction issue accordingly.

And it is further ordered and decreed that the defendants pay to the complainant the costs of this suit to be taxed, and that execution issue therefor according to the practice of this court.

ALEX. T. McGILL, *C.*

Respectfully advised.

JOHN T. BIRD, *V. C.*

A true copy.

ALLAN McDERMOTT, *Clerk.*

Petition of Appeal.

New Jersey Court of Errors and Appeals.

JOHN McQUADE, Appellant, and THE INHABITANTS OF THE CITY OF TRENTON, Respondents.	On Appeal. Petition of Appeal.

To the honorable the court of errors and appeals in the last resort in all causes:

The petition of John McQuade, the appellant in the above-stated cause, respectfully shows that your petitioner finds himself aggrieved by a final decree made in the court of chancery by his honor Alexander T. McGill, chancellor of the State of New Jersey, bearing date the ninth day of April, in the year eighteen hun-
45 dred and ninety-five, in a cause wherein The Inhabitants of the City of Trenton were complainants and your petitioner, the said John McQuade, was defendant, in this respect, to wit: that the said decree adjudged that your petitioner, the said John McQuade, be perpetually enjoined and restrained not only from further interfering with the laying and completion of the sidewalk and curbing mentioned in the bill of complaint in this cause, but also from in any manner removing, disturbing or interfering with the said pavement, sidewalk or curbing after the same shall have been completed, and that a writ of injunction should issue accordingly. And your petitioner humbly appeals from the whole and every part of said final decree, which decrees as aforesaid upon the ground that the same is erroneous, in the following respects, to wit:

(1.) Because by said decree the complainants in said cause will be permitted to take the private property of your petitioner for public use, without compensation required to be made under the provisions of the constitution.

(2.) Because by said decree the Pennsylvania Railroad Company will be permitted to take the private property of your petitioner for

public use, without the compensation required to be made under the provisions of the constitution.

(3.) Because by the said decree the property of your petitioner will be damaged, without just compensation made for such damage to your petitioner.

(4.) Because the right to take or injure your petitioner's property in the manner set forth in the pleadings and proofs in this cause had not been acquired, either by the complainant, The Inhabitants of the City of Trenton, or by the Pennsylvania Railroad Company, by the exercise of the power of eminent domain or otherwise.

(5.) Because no procedure for taking or injuring your petitioner's property in the manner set forth in the pleadings and proofs in this cause has been at any time prescribed or enacted by the legislature.

(6.) Because the pleadings and proofs show that your petitioner's property is sought to be taken for public use by the Pennsylvania Railroad Company without just compensation first made to your petitioner.

46

(7.) Because the pleadings and proofs show that the respondents are not without a remedy at law, and that the decree is but an attempt to enforce a city ordinance for which there is a legal remedy.

(8.) Because the said decree is in sundry other respects contrary to the Constitution of the United States and to the law of the land.

Your petitioner therefore prays that the said decree of the said chancellor may be in all respects reversed, set aside and for nothing holden, and that your petitioner may have such relief in the premises as to this honorable court shall seem meet.

ROB'T S. WOODRUFF, JR.,
Solicitor and of Counsel with Appellant.

Filed April 25, 1895.

HENRY C. KELSEY, *Clerk.*

A true copy.

Answer to Petition of Appeal.

The answer of the above-named respondents to the petition of appeal of the above-named appellant.

These respondents, not acknowledging all or any of the matters which in said petition of appeal are contained to be true, for answer thereto, nevertheless, says and admits that a decree was, on the ninth day of April last past, made and entered in the court of chancery as in said petition stated; but as to the substance and form thereof these respondents pray leave to refer thereto when the same shall be produced. And these respondents are advised and believe it to be true that said decree is agreeable to equity, and they pray that the same may be confirmed with costs to be adjudged to these respondents.

____ ____,
Solt. and Counsel with Defendants.

47 New Jersey Court of Errors & Appeals, November Term, 1895.

Between—

JOHN McQUADE, Appellant,
and
THE INHABITANTS OF THE CITY OF TRENTON, Respondents.
} On Appeal. Remittitur.

This cause having been brought to a hearing on an appeal from the court of chancery at the present term of this court, and William M. Lanning, Esq., and R. S. Woodruff, Jr., Esq., of counsel with the appellant, and John Reilstab, of counsel with the respondents, having been heard, and the questions brought up by said appeal having been duly considered, it is on this twenty-first day of November, A. D. eighteen hundred and ninety-five, ordered, adjudged, and decreed that the decree of the court of chancery, made on the ninth day of April, eighteen hundred and ninety-five, which is appealed from by the appellant, be, and the same is hereby, in all things affirmed, with costs in this court and in the court of chancery to be paid by the appellant, and that the petition of appeal be dismissed; and it is further ordered that the record be remitted to the court of chancery to proceed further thereon according to law and the practice of said court.

On motion of—

JOHN RELLSTAB,
Solicitor & Counsel of Respondents.

[Endorsed:] New Jersey court of errors and appeals, November term, 1895. Between John McQuade, appellant, and The Inhabitants of the City of Trenton, respondents. On appeal. Remittitur. John Rellstab, sol'r of respondents. "Filed Nov. 30, 1895, as of Nov. 21, 1895. Henry C. Kelsey, clerk."

48 STATE OF NEW JERSEY,

[Vignette.]

DEPARTMENT OF STATE.

I, George Wurts, secretary of state of the State of New Jersey and *ex officio* clerk of the court of errors and appeals in the last resort in all causes in and for the State of New Jersey, do hereby certify that the foregoing is a full, true, and complete copy of the record in the case of John McQuade, appellant, and The Inhabitants of the City of Trenton, respondents, on appeal from the court of chancery, and of the "petition of appeal," "answer to petition of appeal," and the "final decree and remittitur" of the said court and all proceedings in the cause, as the same remains on file and of record in my office.

Seal of the Secretary of the State of New Jersey.

In testimony whereof I have hereunto set my hand and affixed the official seal of said court this the fifth day of June, A. D. 1897.

GEORGE WURTS,
Secretary of State and ex Officio Clerk of the Court of Errors and Appeals.

49 Know all men by these presents that we, John McQuade, of Trenton, New Jersey, as principal, and John Kelly and James West, both of Trenton, New Jersey, as sureties, are held and firmly bound unto The Inhabitants of the City of Trenton in the full and just sum of one thousand $\frac{0}{100}$ ($1,000) dollars, to be paid to the said The Inhabitants of the City of Trenton, its certain attorney, successors, legal representatives, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 17th day of May, in the year of our Lord one thousand eight hundred and ninety-seven.

Whereas lately, at a term of the court of errors and appeals in the last resort in all causes of the State of New Jersey, in a suit depending in said court between John McQuade, appellant, and The Inhabitants of the City of Trenton, respondents, a judgment or decree was rendered against the said John McQuade, and the said John McQuade having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the said judgment or decree in the aforesaid suit, and a citation directed to the said The Inhabitants of the City of Trenton, citing and admonishing them to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date thereof:

Now, the condition of the above obligation is such that if the said John McQuade shall prosecute his writ to effect and answer all costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

JOHN McQUADE. [SEAL.]
JOHN KELLY. [SEAL.]
JAMES WEST. [SEAL.]
JAMES WEST. [SEAL.]

Sealed and delivered in presence of—
JOHN DUNPHY.
JOHN DUNPHY.
JOHN DUNPHY.

Approved by—
GEORGE SHIRAS, JR.,
Assistant *Justice of the Supreme Court of the United States.*

50 I herewith acknowledge service of the within bond this fourteenth day of June, A. D. 1897.

WELLING G. SICKEL,
Mayor City of Trenton, N. J.

51 UNITED STATES OF AMERICA, *ss:*

To The Inhabitants of the City of Trenton, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the court of errors and appeals of the State of New Jersey, wherein John McQuade is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable George Shiras, Jr., associate justice of the Supreme Court of the United States, this 22d day of May, in the year of our Lord one thousand eight hundred and ninety-seven.

GEORGE SHIRAS, JR.,
Associate Justice of the Supreme Court of the United States.

52 STATE OF NEW YORK, }
City & County of New York, } *ss:*

On this 7th day of June, in the year of our Lord one thousand eight hundred and ninety-seven, personally appeared Edward C. Wagner before me, the subscriber, a notary public, and makes oath that he delivered a true copy of the within citation to The Inhabitants of the City of Trenton by delivering the same to Welling G. Sickel, the mayor of the city of Trenton, New Jersey, at said city, on the third day of June, 1897.

EDWARD C. WAGNER.

Sworn to and subscribed the 7th day of June, A. D. 1897.

[Seal of John McClure, Notary Public, New York.]

JOHN McCLURE,
Notary Public, N. Y. Co.

Endorsed on cover: Case No. 16,612. New Jersey court of errors and appeals. Term No., 399. John McQuade, plaintiff in error, *vs.* The Inhabitants of the City of Trenton. Filed June 17th, 1897.

No. 125.

Brf. of D. McClure for P. E.

Office Supreme Court U. S.
FILED
DEC 27 1898
JAMES H. MCKENNEY,
Clerk

Filed Dec. 7, 1898.

In the Supreme Court of the United States.

Writ of Error to the Court of Errors and Appeals of the State of New Jersey.

JOHN McQUADE,
Plaintiff-in-error,

vs.

THE INHABITANTS OF THE CITY OF TRENTON.

BRIEF FOR PLAINTIFF-IN-ERROR.

DAVID McCLURE,
Of Counsel.

THE MARTIN B. BROWN COMPANY, Printers, 49 to 57 Park Place, N. Y.

THE MARTIN B. BROWN COMPANY, Printers, 49 to 57 Park Place, N. Y.

Supreme Court of the United States.

JOHN McQUADE,
Plaintiff-in-Error,

against

THE INHABITANTS OF THE CITY OF TRENTON.

Brief for Plaintiff-in-Error.

STATEMENT OF THE CASE.

In 1891 the Pennsylvania Railroad Company, being engaged in widening its tracks running through the City of Trenton, desired, in connection with this work, to elevate the bridge crossing its tracks on Lamberton street in that City. The elevation of the bridge necessitated the construction of approaches to it in Lamberton street and in the neighboring streets. For this purpose the railroad company applied to the Common Council of the City of Trenton, and procured from it an ordinance, passed on February 17th, 1891, authorizing the construction of the desired bridge and the making

of certain changes in the street-grades leading up to it on both sides so as to make a uniform approach to the bridge. This ordinance is set forth in full on pages 13 to 16 of the record. It specifically recites that it is made at the instance of the Pennsylvania Railroad Company, and for the purposes of that company in the widening of its tracks and roadbed (Record, p. 13), and, after establishing several alterations of grade, closes with the condition that the Pennsylvania Railroad Company must "provide means to carry off all of the surface waters whose present course will be directed or changed by the aforesaid alteration and changes in said streets," and must "furnish and pay for the labor and materials necessary to make such alterations, and indemnify said inhabitants of the City of Trenton against any expenses or losses which may be incurred as damages to property affected or otherwise by the said changes of grade and said vacation of portions of said street, which could be enforced against the city by suit, and shall within thirty days after the passage hereof file a satisfactory bond with the city solicitor for the faithful performance of said agreement before mentioned; and this ordinance shall not go into effect until the said bond is filed and the expense of the passage of this ordinance is paid."

Crossing Lamberton street, which runs from north to south, and somewhat to the southward of the railroad bridge, runs Ferry street, upon which, some little distance to the east of Lamberton street, stand two houses owned by Mr. McQuade, the plaintiff-in-error. The alterations authorized by the ordinance for the purpose of forming approaches to the railroad bridge included an alteration in the grade of Ferry street in front of these houses. The effect of this alteration was very materially to heighten the grade, and, whereas

before the change that street had sunk uniformly from east to west, so that the surface waters flowed off westwardly, after the change, at a point some distance east of Lamberton street, the grade of Ferry street was suddenly turned, so that from that point, instead of descending, it *ascended* westwardly, thus creating a hollow between the two opposite grades which tended to collect the surface waters from both sides (Record, pp. 13, 14, 18, 26).

It so happened that this point was only a little to the east of the plaintiff-in-error's houses (Record, pp. 6, 17, 18, 21) and hence one of the results of the grade-change was to accumulate water in front of these houses (Record, pp. 17, 26), so that the "surface water in times of heavy rain is likely to overflow the sidewalk and to flow into" the plaintiff-in-error's cellars (Record, p. 18). Another and even graver result of the change was the practical closing up of the windows of his cellars and the partial burying of his stoop, thus interfering with his light, air, access and egress to and from his property (Record, pp. 18, 19, 20, 29). To use his own language (Record, p. 20), "The cellar windows of the house in which this deponent resides will be almost completely buried beneath the surface of the sidewalk and the light and air thereby excluded from this deponent's property, and the stoop leading to the front door of this deponent's house will also be partially buried beneath the surface of the sidewalk." Moreover, the insertion of an inlet in front of the house in question, in connection with the pipes necessitated by the alteration of grade, affects the value of the property because of the bad odors attendant upon the stagnation of the waters in summer in what is called the check-basin (Record, p. 30). These are the injuries necessarily resulting to the plaintiff-in-error's property from the alteration in Ferry street.

The proceedings by which the ordinance was passed were objected to and resisted by the plaintiff-in-error from the beginning. On several occasions he attended the meetings of the Common Council at which this proposed ordinance was under consideration, and objected to the change of grade on Ferry street (Record, pp. 21, 24, 25). He even spoke in opposition to it (Record, p. 25). Several plans were considered, some of which would not have necessitated any such change and against these the plaintiff-in-error raised no objection (Record, p. 25). What he wanted was that Ferry street should not be disturbed (Record, p. 25). Accordingly, he was gratified when, even after the passing of the ordinance, but before the making of any changes, it was contemplated that the grade changes should be abandoned, and that the desired result should be reached by opening a new street north of the railroad (Record, p. 21). Indeed, he was, apparently, largely instrumental in procuring this change of plan, for he went around getting signatures to the paper objecting to the change in the street (Record, p. 22). His efforts were not successful. The new street-proposal was abandoned and the original plan was carried out in spite of his protests (Record, p. 22).

Before the passage of the ordinance an engineer of the Pennsylvania Railroad Company had come to Mr. McQuade and stated that this change of grade was to be effected and had asked him what he wanted. McQuade replied that he could not tell at that time. The engineer then said something about $500, which the plaintiff-in-error vigorously declined, and a few days later he told this same engineer that he hoped the change would not be made, but that since they were going to do it he would want $3,000. This was refused him, and thereupon he forbade them to interfere with his property (Rec., p. 22).

The work of changing the grade was actually begun at the bridge and proceeded downwards, Mr. McQuade remonstrating all the time (Rec., p. 26). Previously to changing the grade the railroad company's servants proceeded to lay water pipes for the purpose of conducting off the surface waters (Rec., pp. 22–23), and Mr. McQuade objected to this action also (Rec., p. 26) and suggested that the grade be shortened somewhat, so that it would end before reaching his house and thus not interfere with him (Rec., p. 29). To this the railroad people agreed, and the damage to the property being thus reduced to an extremely small item the plaintiff-in-error consented to accept from $200 to $300 for such damages (Rec., p. 29). By this shortening the beginning of the altered grade would have been brought to the west of his property, thus leaving the street in its original condition in front, and the injury would simply have been such as would necessarily arise from the inlet and its attendant bad odors and stagnation (Rec., p. 30).

A resolution was accordingly adopted shortening the grade 21 feet (Rec., p. 29). But the railroad company *departed* from the arrangement and undertook to do something wholly different. Of course the plaintiff-in-error objected, and after some further parleying the railroad company refused to pay Mr. McQuade the sum at which he fixed his damages, and the negotiations ceased (Rec., pp. 29–30).

All this happened in November, 1891. And in the spring of the following year, the authorities having left the street incomplete, McQuade asked the railroad company's representatives what they proposed doing to finish the work. They neglected to do anything and also failed to pay him any damages, and accordingly he removed the objectionable inlet from before his premises. Thereupon the railroad company put it back and proceeded to extend the street-grade to the length

authorized by the original ordinance (Rec., pp. 23–30). While they were making the alteration in the sidewalk the plaintiff-in-error vigorously objected and endeavored to prevent the making of the unlawful alteration by physical interference. The railroad company, however, aided by the City, succeeded in making the alteration in spite of McQuade's endeavors to prevent it, and raised the grade in front of his premises, putting in new earth and setting flagstones and bricks at the higher elevation, thus closing his cellar windows and burying his stoop (Rec., pp. 6–9, 12, 23–24). Thereafter the plaintiff-in-error removed the flagstones, notified the Pennsylvania Railroad Company of the fact and renewed his objections (Rec., 11–24).

All of the plaintiff-in-error's objections were founded on the fact that he had never been compensated for the damages done to him (Rec., p. 27). No agreement was ever entered into with him with reference to his compensation for damages, either by the City or the railroad company, and the City never even offered him a dollar. The only offer of the railroad company was the rejected one of $500 already referred to. No estimate under or in pursuance of any legal proceedings was ever made (Rec., p. 20). No legal proceedings to procure such an estimate were ever even begun.

In March, 1894, the City of Trenton filed a bill in equity setting forth these facts and praying for an injunction against the hindrance by the plaintiff-in-error of the relaying of the pavement and against his future interference with the carrying out of the ordinance (Rec., pp. 4–8). To this bill the plaintiff-in-error made answer, denying the complainant's right to the relief prayed for (Rec., pp. 16–19), but the Chancellor (Rec., pp. 32–33), with all of the above facts before him, issued the injunction prayed for, which, upon appeal to the New Jersey Court of Errors and Appeals,

was affirmed in all respects (Rec., pp. 33–35). The present writ of error was obtained for the purpose of reviewing these proceedings (Rec., p. 1).

The constitutional question was expressly raised by the answer of the plaintiff-in-error to the bill of the City of Trenton for an injunction, and, on the appeal to the New Jersey Court of Errors and Appeals, was included in his petition among the grounds upon which he claimed that the Chancellor's decree was erroneous (Rec., p. 34).

The assignment of errors filed with the petition to this Court for a writ of error to the New Jersey Court of Errors and Appeals is set forth on pages 1 to 3 of the Record, and the errors therein recited are those which we now assert and intend to urge.

The Chancellor's decree, affirmed by the New Jersey Court of Errors and Appeals, to which Court the present errors are assigned, was based upon the views contained in the opinion of Vice-Chancellor Bird which preceded the decree. That opinion proceeds in part as follows (Rec. pp. 31–32):

"Independently of the interference of the City authorities and what seems to be on their part the exercise of a legal right, the only question that can be litigated is the question between McQuade and the city with respect to the damages which he is entitled to. These damages he might have had ascertained before the company or the city took any steps whatever. But he allowed the company to go on and make all the changes necessary to the completion of the undertaking which had been consented to by the city, without taking direct proceedings to compel them to ascertain his damages and to compensate him therefor."

The Vice-Chancellor was clearly in error, as our foregoing statement of the facts shows, in saying that McQuade allowed the Railroad Company to go ahead and make the changes complained of. He made continual

attempts to prevent that action, and he was not called upon, as we shall point out later, to become the actor in judicial proceedings to collect compensation, the computation and payment of which was made by the *law of the land* a condition precedent to the acquirement of any rights against him by the Railroad Company.

We contend that the view of the law taken by the Chancellor and adopted by the Court of Errors and Appeals was erroneous; that neither the City of Trenton nor the Pennsylvania Railroad Company ever acquired any right to interfere with any property of the plaintiff-in-error; that their action in so interfering was a wrong and a violation of the Constitutions of New Jersey and the United States; that the earth and stone which they piled in front of his houses created a nuisance which he had the right to abate; and that the decree of the Court of Errors and Appeals sustaining the perpetual injunction against his exercise of this right, together with the actions of the City and the Railroad Company under the ordinance, and their failure to institute proceedings for the computation of the damages due, constituted a taking of private property without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States.

POINTS.

A.

The Fourteenth Amendment of the Constitution of the United States prohibits the States from taking private Property without Compensation, or for any but a public Use.

"In the Fourteenth Amendment * * * the prohibition against the State is confined to its depriving

any person of life, liberty or property without due process of law. It is claimed, however, that the citizen is deprived of his property without due process of law, if it be taken by or under state authority for any other than a public use, either under the guise of taxation or by the assumption of the right of eminent domain. In that way the question whether private property has been taken for any other than a *public use* becomes material in this court, even where the taking is under the authority of the State instead of the Federal Government."

Fallbrook Irrigation District vs. *Bradley*, 164 U. S., 158.

In the same way the question whether private property has been taken *without just compensation* under the authority of a State becomes material in the Supreme Court of the United States, by virtue of the prohibition contained in the Fourteenth Amendment against the taking of private property without due process of law.

The expressions, "*due process of law*" and its synonym, "*the law of the land*," as Mr. JUSTICE JOHNSON said in the case of *Bank of Columbia* vs. *Oakley* (4 Wheat., 235, 244), "were intended to secure the individual from the arbitrary exercise of the powers of government unrestrained by the established principles of private rights and distributive justice."

The phrase, "*due process of law*," refers "to that law of the land in each State which derives its authority from the inherent and reserved powers of the State, exerted within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions."

Hurtado vs. *California*, 110 U. S., 516.

"Due process of law is process according to the law of the land. This process in the States is regulated by *the law of the State.*"

Walker vs. *Sauvinet*, 92 *U. S*, 90.

In the case of *Pumpelly* vs. *Green Bay Company*, 13 Wall., 166, this Court had occasion to inquire into the power of the State of Wisconsin to take private property without compensation; and, denying such right, it enforced the protection afforded to the citizen by the United States Constitution.

"Though the Constitution of the United States," said the Court, "provides that private property shall not be taken for public use without just compensation, it is well settled that this is a limitation on the power of the Federal Government, and not on the States. The Constitution of Wisconsin, however, has a provision almost identical in language, viz., that the property of no person shall be taken for public use without just compensation therefor. Indeed, this limitation on the exercise of the right of eminent domain is so essentially a part of American constitutional law that it is believed that no State is now without it."

The inquiry, then, at this point is: Does the organic law of the State of New Jersey prohibit the taking of private property without just compensation? That inquiry must be answered in the affirmative.

B.

The organic Law of New Jersey forbids the Taking of private Property for public Use without just Compensation first made.

The Constitution of the State of New Jersey contains the following provisions:

Art. I., sec. XVI.:

"Private property shall not be taken for public use without just compensation."

Art. IV., sec. VII., subd. 8 :

"Individuals or private corporations shall not be authorized to take private property for public use without just compensation *first* made to the owners."

With these fundamental provisions in the Constitution of New Jersey, we are brought to the question whether they have been complied with in the present instance. That question must be answered in the negative.

C.

The organic Law of New Jersey forbidding the Taking of private Property for public Use without just Compensation has not been complied with in the present Instance.

I.

NO JUST COMPENSATION FOR THE PROPERTY TAKEN HAS BEEN MADE OR OFFERED.

No proceedings have ever been instituted for the purpose of ascertaining what damages the plaintiff-in-error has sustained. His easements of light, air and access have been seriously curtailed. The railroad company has succeeded in obtaining approaches to its bridge at the expense of the plaintiff-in-error, and nothing whatever has been done or attempted to be done towards his compensation. The prohibition contained in the Constitution of the State of New Jersey has been openly violated, and the violation extends to the Fourteenth Amendment of the Constitution of the United States.

II.

THE ORDINANCE OF THE CITY OF TRENTON UNDER WHICH THE ALTERATION IN THE STREET WAS EFFECTED CONTAINS NO PROVISION FOR THE COMPUTATION OR PAYMENT OF DAMAGES.

This ordinance under which the railroad company obtained the right to enhance the value of its property by depriving other surrounding property-owners of certain of their premises or easements makes absolutely no provision for ascertaining the amount of compensation due to those property-owners, or for paying, or securing to them, any such compensation. The entire ordinance is set forth on pages 13–15 of the record.

The sole references to damages contained in the ordinance are found in the clauses requiring the railroad company to bear all the expenses of the proposed changes and to *indemnify the City of Trenton* against any such expenses or "losses that may be incurred as damages to property affected, or otherwise, by the said change of grades and the said vacation of portions of said street, * * * which could be enforced against the city by suit." (Record, pp. 13–15.)

Here is no provision for the computation and payment of damages to the owners of the affected property, or for the securing to those owners of any future compensation. The City simply provides for its *own* security against possible future *lawsuits*, practically declaring in the ordinance itself that it means to take no steps whatever to compensate the property-owners, but will calmly await suits by them, if they see fit to sue, and will look to the railroad company for indemnity in case such suits are successful. As for the railroad company, with the exception of this indemnity-bond to the City, it is to go free of all respon-

sibility, and is empowered by the ordinance to seize the property of citizens of the State for its own purposes without, as a condition precedent, or at any time, making any provision to compensate them for their losses. This is plainly unconstitutional.

But it may be said that this ordinance, being the act of a municipality, is to be considered in the light of the general powers vested in that municipality by the legislature of the State; and that therefore we must look elsewhere, in the Charter of the City of Trenton, or in the General Statutes of New Jersey, to find, if we can, a provision for the compensation of property-owners in such cases. We will now examine those laws.

III.

The provision in the Charter of Trenton as to the Alteration of Streets has not been complied with.

By the Charter of the City of Trenton, the Common Council is authorized (Act of 1874, Title VII, sec. 76, subdiv. 1):

"To lay out, accept and open any street, road, highway or alley, public park or square within said city; to order and cause any street, road, highway or alley already laid out, or which shall hereafter be laid out, to be vacated, straightened, *altered* or widened, and to take and appropriate for such purpose any *lands and real estate*, upon making compensation to the owner or owners thereof, as is hereinafter mentioned and provided."

Provisions then follow, establishing a complete method of procedure for determining the damages due to the owners of property taken under this authority, to which specific reference will be made at a later point in this brief (page 20).

The above-quoted provision does not apply to mere *changes of grades*. But the erection in a street of an approach to a railroad bridge is an *alteration* of the street within the above provision and not a mere *change of grade*.

Reed vs. Camden, 24 Vr., 322.

In that case it was held that a provision in the Camden Charter authorizing the Camden Council to cause streets to be "vacated, opened, *altered* or widened" (the very language used in the charter-provision which we are now considering) covered a change effected in a street of Camden under an ordinance in behalf of this same Pennsylvania Railroad Company whereby the latter, on indemnifying the City of Camden, was authorized to build an elevated bridge and to construct approaches thereto. Provision, however, had been carefully made for compensating the owners of property along the line of change, and proceedings had been actually taken to fix the amount of such compensation.

If, therefore, the property taken in this instance could be regarded as falling within the description of the above-quoted provision, namely, "*lands and real estate*," then the ordinance altering Ferry street and the action taken thereunder went beyond the powers of the City of Trenton, since the procedure prescribed in the charter for computing and paying compensation was not complied with. The requirements of that procedure will be discussed at a later point in this brief (page 20).

Where, on the other hand, as is the case here, the property taken does not fall within the description "*lands and real estate*," then the above-quoted provision does not apply and we must look elsewhere in the charter or in the general statutes of the State for some clause or act providing a method of computing

and paying compensation upon the taking of such property as was here taken during the *alteration* of streets.

No such clause or act can be found. The statutes of New Jersey are silent on the subject, and the property taken not being "*lands*" or "*real estate*," the seizure thereof by the City of Trenton and the railroad company, instead of being simply without compliance with an express statutory provision as to compensation, was absolutely without any express statutory authority whatever, and was in utter disregard of the Constitutions of New Jersey and the United States. For it is clear that such a taking of property as occurred in this case falls within the prohibition of those constitutions. In the absence of statutory provisions to the contrary, consequential damages caused to abutting property-owners by mere *changes of grade* in a street do not of course constitute a taking of property within the meaning of constitutional law. But where, as here, the *alteration* in the street is more than a mere *change of of grade*; where it casts an *additional* servitude upon abutting property-owners and deprives them of valuable easements which were not surrendered at the time when the street became a street; it is clear that the law reaches such an alteration and attaches to it the condition of compensation.

"If the grade of a street is changed otherwise than is authorized by law, the City will be held liable for injuries caused by it."

Dillon on Municipal Corporations, Note to sec. 990 and cases there cited.

"Power to reduce streets to an established grade without liability therefor does not include power to obstruct or authorize the obstruction of streets by the approach to a bridge in a public street whereby the abutting owner's access to the street is prevented,

and water caused to flow and drain upon his property. So the construction by a city under express legislative authority of a levee along Front street to protect the city against inundation of a river after a constitutional provision took effect which makes the City liable for private property damaged for public use where no part of the plaintiff's property was taken—the levee occupying the street alone—but where the plaintiff's access was interfered with and water was thrown by the embankment upon his property, was held to render the City liable for the damages thereby occasioned. The embankment was not regarded by the Court as a mere elevation of the grade of the street, and as being made to improve the street, and hence was not within the uses to which the street was dedicated or acquired, but was an appropriation of the street to a new use."

Dillon on Municipal Corporations, sec. 990, and cases there cited.

To summarize, if the change made in Ferry street was not a mere change of grade, then, the property taken not being *lands* or *real estate*, no provision whatever exists as to compensation; if, on the other hand, such property had been *lands* or *real estate*, then the provision in the Trenton Charter as to compensation would still have been wilfully neglected by the City and the Railroad Company, as no attempt was ever made to comply therewith.

IV.

THE PROVISIONS IN THE CHARTER OF TRENTON AND THE GENERAL ROAD ACT OF NEW JERSEY AS TO CHANGES OF GRADE WERE NOT COMPLIED WITH.

It may be argued that the alteration in Ferry street under the ordinance in question was a mere *change of grade*. In that case the applicable provision of the Charter of Trenton is contained in title VII., section 86, which reads as follows:

"That it shall be the duty of the common council, as soon as convenient, to establish, by ordinance, the

grades of the several streets and alleys which now are or may hereafter be opened in said city, and it shall not be lawful, after the same shall have been so established, to alter the grade of any street or alley, except by ordinance, nor shall any such ordinance be passed until the common council shall have caused a notice of such contemplated alteration to be served upon the owners of lots fronting or bordering upon that part of said street or alley, the grade of which is proposed to be altered, or to be published for two weeks in two of the daily papers of said city; which notice shall state the time when the common council will proceed to consider said matter, which time shall not be less than two weeks from the time of serving or the first publication of said notice; at the time said matter shall come up for the consideration of the common council, all persons interested may appear and be heard, by themselves or their counsel, for or against the alteration proposed; all changes with such alteration of grade may render necessary in gutters, sidewalks, front fences or other property of any land-owner, shall be made by the common council at the time of altering such grade, and said common council shall have a right to recover of any land-owner who was an applicant for such alteration the expense of making such change in his or her gutter, sidewalk, front fences or other property, together with costs of suit, by an action of debt in any court of competent jurisdiction, in the name of 'the inhabitants of the city of Trenton,' against such land-owner for so much money laid out and expended by them for the use of such owner, and declare generally and give the special matter in evidence."

This section, it will be observed, contains *no* provision for computing or paying to the owners of abutting buildings any damages due to a change of grade. But this desideratum is supplied by the GENERAL ROAD ACT of the State of New Jersey (General Statutes of New Jersey, vol. III., p. 2820, secs. 70-75), which reads on this subject as follows:

"70. That an action upon the case doth and shall lie in behalf of any person owning any house or other building standing and erected upon any street or high-

way, the grade whereof shall be, or shall have been, altered by virtue of the ordinance, resolution or other proceeding of the legislative authority of any city, borough or town corporate in this state, to recover from the said city, borough or town corporate, all damages which such owner shall suffer by reason of altering any such grade; *provided*, that this act shall not be construed to authorize any action for damages by any such alteration already actually worked and put into effect; *and provided further*, that no such action shall be brought after the expiration of twelve months from the working of any such grade.

"71. That all provisions in any charter or law of this state, whereby the expenses of working any grade established in lieu of a former grade existing, and according to which buildings have been erected, are directed to be borne by the owners of land in any street or highway so graded, shall be and the same are hereby repealed.

"72. That the foregoing provisions respecting grades shall not refer to any city, town or borough whose charter or any supplement thereto now existing, or which shall hereafter be passed, provides or shall provide for assessing and paying compensation to persons injured by the making of grades established or to be established.

"73. That the grade of no street, in any city or town which has been built on, shall be altered, unless by the consent of the majority of owners in interest of the lots fronting on the part proposed to be altered, *nor without paying to the owners of such buildings the damages sustained by the alterations of such grade.*

"74. That the damages mentioned in this act, to be paid to such owners, shall be assessed upon and paid by the lands and real estate benefited thereby, in proportion to the benefits received; and such damages shall be ascertained, estimated and assessed, and the amount thereof shall afterward be justly and equitably assessed and apportioned upon the lands and real estate benefited thereby, by commissioners to be appointed, and who shall act in all things in the same manner as now provided in the respective charters of the several cities, boroughs and towns corporate in this state, for the laying out, opening or widening

any street, highway, road or alley, and all proceedings in such matters shall be in conformity with and analogous to the proceedings directed and the privileges allowed in such charters; and such provisions are hereby extended and made applicable in all things to the estimating, payment, apportionment and collection of such damages in the same manner as if such subject had originally been embraced therein.

"75. That nothing in this act contained shall be so construed as in any manner to affect any contract or contracts which may have been entered into by the authorities of any city, borough or town corporate in this state, with any person or persons for the working, grading, leveling or otherwise improving any street, highway, road or alley."

These provisions apply, of course, to the streets of the City of Trenton, and it has been held that the grades of streets cannot be changed *without paying damages* to the owners of abutting buildings.

State, Hudson Co. vs. *Seymour*, 6 Vr., 47.

By section 74 of the Road Act above quoted the procedure to be followed in computing and paying the damages provided for is made analogous to and identical with the procedure prescribed by the respective charters to be followed in cases of laying out, opening, *altering* or widening streets in the respective municipalities. That procedure, in the instance of the City of Trenton, is prescribed, as has already been pointed out, by sections 79–81 of the Charter.

Thus, then, if the bridge approach erected in Ferry street is to be regarded as a mere *change of grade*, the statutes of New Jersey required the *same* computation and payment of damages for the taking of *any* property rights for that purpose which, if that approach is to be regarded as an *alteration* in the street, they required for the taking of any "*lands*" or "*real estate*."

We have, therefore, reduced the discussion to the three following propositions:

(*a*) If the erection in Ferry street was an "*alteration*," the property taken not being "*lands*" or "*real estate*," the ordinance and the proceedings thereunder were absolutely without statutory authority and were in direct defiance of the Constitutions of New Jersey and the United States.

(*b*) If the erection in Ferry street was an "*alteration*," and the property taken could be regarded as "*lands*" or "*real estate*," the ordinance and the proceedings thereunder were, nevertheless, in violation of the Constitutions of New Jersey and the United States, because the procedure required by sections 79–81 of the Trenton Charter was not pursued or attempted to be pursued.

(*c*) If the erection in Ferry street was a mere *change of grade*, whatever the nature of the property taken, the ordinance and the proceedings thereunder were in violation of the said Constitutions, because the procedure required by sections 79–81 of the Trenton Charter was not pursued or attempted to be pursued.

V.

THE PROCEDURE PRESCRIBED BY SECTIONS 79–81 OF THE TRENTON CHARTER FOR THE COMPUTATION AND PAYMENT OF DAMAGES WAS NOT PURSUED.

The procedure which was thus wilfully neglected by the City and the Railroad Company in taking the property of the plaintiff-in-error is prescribed by sections 79–81 of the Trenton Charter. It is as follows:

"79. And be it enacted, That whenever the common council shall determine, by ordinance, to lay out and open any street, road, highway or alley, public park or square within said city, or to alter, widen or straighten

any street, road, highway or alley, or to make any sewer or drain in any part of said city, and to take and appropriate for such purpose any lands or real estate, they are hereby authorized to treat with the owner or owners thereof for the same, and for the purpose expressed in such ordinance, they may purchase such lands and real estate of the owner or owners thereof, and make such compensation therefor as they shall judge reasonable, and thereupon shall receive from such owner or owners a conveyance of such lands and real estate to the city, and such compensation shall constitute a part of the whole amount of costs, damages and expenses to be assessed under and in pursuance of the provisions contained in this act.

"80. And be it enacted, that when the said common council cannot agree with the owner or owners of such required lands or other real estate for the same, or when by reason of the legal incapacity or absence of any such owner or owners, no such agreement can be made, it shall be lawful for the "board of city assessors," and they are hereby required upon application in writing of the said common council, signed by their presiding officer, which application shall specify the street, road, highway or alley proposed to be laid out, widened or altered, with the alterations proposed to be made, or the sewer or drain to be made, and the land or other real estate, with the appurtenances intended to be taken for such purpose, to make an estimate and assessment of the damages that any such owner or owners will sustain by laying out, altering or widening any such street, road, highway or alley, or making such drain or sewer; and in estimating and assessing such damages the said Board of Assessors shall have due regard as well to the value of the land or other real estate, with the appurtenances, as to the injury or benefit of the owner or owners thereof by laying out, altering or widening any such street, road, highway or alley, or making such sewer or drain, and it shall be the duty of the said Board of Assessors after estimating said damages, to assess the amount thereof, together with the sums which may have been agreed upon as the price of any of the lands or other real estate to be taken for such purpose aforesaid, between the common council and any of the owners of

such lands or other real estate, fairly and justly upon such lots or subdivisions of lots as in their opinion will be benefited by said improvement, specifying in such assessment such lots or subdivisions of lots, by the letters and numbers by which they are distinguished on the city atlas, together with the name of the respective owner or owners thereof, and the amount assessed upon each lot, which said assessment shall be embraced in the report of the said board of assessors hereinafter directed to be made; and in cases where the common council shall agree with the owner or owners of such lands as to the compensation therefor, the board of city assessors shall make their estimate for damages in accordance therewith.

"81. And be it enacted, that the common council shall designate a time and place for the meeting of the said "board of assessors," not less than twenty days from the date of said application, of which time and place the city clerk shall give notice by advertisement, in not less than two of the daily newspapers published and circulated in said city, at least ten days before the time of meeting; and it shall be the duty of the said board of assessors, having first taken and subscribed an oath or affirmation before the mayor or city clerk, fairly and impartially to execute the duties imposed upon them by this act, to meet at the time and place appointed to proceed to view the said lands or other real estate, with the appurtenances, and to make a just and true estimate and assessment as aforesaid, and for this purpose the said board of assessors shall have power to swear and examine witnesses, and to adjourn from time to time, and shall report their proceedings to the said common council, with the assessment and appraisement aforesaid, which report shall be made in writing, under the hands and seals of said members of said board of assessors, or any two of them, and filed within thirty days after their first meeting as aforesaid together with the said application and appointment, and oaths and affirmations of the said assessors, with the clerk of said city, there to remain of record; and the clerk of said city shall lay a report before the common council at their next meeting thereafter, which report or copy thereof, certified by the said city clerk, shall at all times be considered as plenary evidence of the power of common

council to enter upon, take and use the said land or other real estate, with the appurtenances, the city treasurer first tendering to the owner or owners thereof, if resident in this state, the amount so awarded them; but if any such owner is not a resident of the city, or, upon due inquiry, cannot be found therein, or is a lunatic or idiot, or under age, or if for any other lawful cause he is incapacitated to receive the same and sign a proper receipt therefor when tendered, then the said treasurer shall make affidavit of such facts, and file the same with the city clerk, and the common council shall, after inquiry into the facts of the case, cause the amount to be kept in the city treasury or invested in good security, for the use of the person for whom it may be due, and the said moneys shall be paid by the city to the person or persons entitled thereto, on demand, with the interest collected on the same."

By these sections, it will be seen, the Common Council are authorized to treat with the owners and to purchase the property in question by *agreement*. But if they cannot agree with the owners, they must apply in writing to the Board of City Assessors, specifying the street, intended alteration and property to be taken, and the Board of City Assessors are then directed to make an estimate and assessment of the damages sustained by the owners. The Common Council must designate a time and place for the meeting of the Board of Assessors, of which time and place the clerk must give notice by advertisement in not less than two daily Trenton newspapers. The Board of City Assessors are vested with power to call witnesses, to take testimony and to adjourn hearings from time to time, and must report their proceedings to the Common Council in writing and file their report with the said clerk, who is then required to lay a report before the Common Council at their next meeting, and THEN FOR THE FIRST TIME *we find the statute recognizes the power of the city to enter upon, take and use the property needed, the City Treasurer, however,* FIRST TENDERING TO THE OWNER THE AMOUNT SO AWARDED.

VI.

THE COMPUTATION AND TENDER OF DAMAGES WAS A CONDITION PRECEDENT TO THE RIGHT OF THE CITY AND THE RAILROAD COMPANY TO TAKE THE PROPERTY OF THE PLAINTIFF-IN-ERROR.

The above analysis of the provisions of the statutes shows that, under the law of the land in New Jersey, the amount of the damages must be ascertained and assessed by the proceedings prescribed in the act, and must be tendered to the owners injured, *before* any right to cause the said damages vests in the municipality, or in those acting under it, such as the railroad company. This is in accordance with the express provisions of the New Jersey Constitution and the general doctrine that private property cannot be taken for public purposes until *after* the value of the property is determined by due process of law, and is at least tendered to the owner whose rights are to be sacrificed.

While the right to take private property for public use is necessarily allowed to every government, it is a primary requisite that compensation shall be made for the property taken. The effect of the right of eminent domain against the individual "must be nothing more than a power to oblige him to sell and convey when the public necessities require it," and the compensation must be *pecuniary* and must also be *certain*. It is not competent for the State, or one of its political divisions or municipalities, or for private corporations authorized by the State, to deprive any person of his property and to "turn him over to an *action at law* against a corporation, which may or may not prove responsible, and to a judgment of uncertain efficacy; for the consequence would be in some cases that the party might lose his estate without redress in violation of the inflexible maxim upon which the right is based."

Cooley's Constitutional Limitations, p. 694.

More particularly is this so when the taking is by a private corporation — as in the present case. Suppose for a moment that some general provision for compensation had been made in the Trenton ordinance — which is not, however, the fact — upon what fund was this plaintiff-in-error to rely? Would he not have been turned over to an action at law against a corporation which might or might not prove responsible? The ordinance, it will be observed, was procured by the *Pennsylvania Railroad Company* for its *own* convenience in widening its tracks. The widening of the roadbed made it desirable to heighten the street-bridge extending over the tracks and the grade of the streets was changed *only* in order to bring them gradually to a level with the bridge. The purpose of the ordinance was not in any sense municipal, and the changes were effected purely for the benefit of the railroad corporation. It is for this reason that such an alteration cannot be regarded as a mere *change of grade*. If any benefits were to accrue to the municipality they were incidental and remote. Had the changes contemplated by this ordinance been for the benefit of the municipality, and not for the benefit of the railroad company, the latter would not have been called upon by the Common Council to do the work with its own money, to pay all the expenses and to indemnify the City against suits by property-owners. If the changes had been for municipal purposes, the Common Council would have exercised the power vested in it by the Charter of the City of Trenton and have assessed the expenses against benefited property along the line of change. It well knew, however, that such an assessment would have been wholly improper, for no argument is needed to support the proposition that, in the absence of the most express provision to that effect, the Legislature of a State cannot be assumed to have delegated to a municipality power to

make any conceivable change in the streets for whatsoever purpose or for whosesoever benefit.

It is, therefore, open to serious doubt whether the power delegated by the Legislature to the Trenton Common Council to *alter* streets and to take private "*lands and real estate*" for that purpose upon making compensation, or to change the grades of streets in conformity with the Charter and the General Road Act, extended to the making of the ordinance in question. The exercise of the right of eminent domain is limited to appropriations of private property for *public purposes*, and it may well be doubted whether the Common Council, in the exercise of their delegated power, could irrefutably declare that to be a *public purpose* which all the facts disclose was *no* public purpose at all.

However that may be, it is perfectly patent that *before* the City of Trenton or the Railroad Company could acquire any right to interfere with this property, the statutory requirements as to the computation and tender of damages had to be complied with. Not only do the terms of the New Jersey Constitution already quoted (Art. IV., sec. VII., subd. 8) and of the New Jersey statute make this apparent, but many decisions to that effect have been reached by the Courts of New Jersey.

Doughty vs. *Somerville & Easton R. R. Co.*, 3 Hal. Ch., 51.
Morris & Essex R. R. Co. vs. *Hudson Tunnel Co.*, 10 C. E. Gr., 384.
Carson vs. *Coleman*, 3 Stock., 106, 525.
Johnson vs. *Baltimore & New York R. R. Co.*, 18 Stew., 454.

So jealous indeed is the State of New Jersey in its protection of this fundamental right of property that

it is the uniform practice of the Court of Chancery in that State *to interfere by injunction*, as it did in the cases above cited, and thus to forbid the taking of the property of one person or corporation by another without compensation *first* paid, so as not to leave the property-owner to a mere action for damages.

Jersey City and Bergen Co. vs. *Jersey City and Hoboken R. R. Co.*, 5 C. E. Gr., 62.
Folley vs. *Passaic*, 11 C. E. Gr., 216.

In the case cited from 5 C. E. Green, the New Jersey Court of Chancery said :

"It is the settled doctrine of this Court, to prevent the property of one person or corporation from being taken by another, for public or any use without compensation *first* paid. In almost every case of this kind, compensation could be made in damages recoverable in an action at law, and experience shows that juries do not generally give inadequate damages ; yet this Court always interferes by injunction, and does not permit property to be taken and the party put to his action."

D.

The Plaintiff-in-Error had a Right to prevent the City of Trenton and the Railroad Company and their Servants from entering upon or taking Possession of his Property, and also to remove the Obstructions placed by them in front of his Buildings.

We have shown that the plaintiff-in-error was by the ordinance and the action taken thereunder deprived of his property without due process of law in violation of

the Constitutions of New Jersey and of the United States; that through their failure to provide for and tender to the plaintiff-in-error just compensation for the property so taken, both the City of Trenton and the railroad company failed to acquire any right to interfere with or enter upon the said property. The act of these parties in placing obstructions of stone and earth in the street in front of Mr. McQuade's buildings, particularly damaging him and infringing his rights of property, was therefore a wrongful and illegal act, without the shadow of justification or authority.

Ballantine vs. *Kearney*, 23 Vr., 338.

That the obstructions constituted a private nuisance entitling the plaintiff-in-error to redress is clear.

"While the State may restrict its own right, it cannot restrict or take away the rights which are purely individual, even though they are intimately associated with the public right. An example has been given in another place of a railroad laid down in a public highway by State consent, and it was stated that this consent would not empower the railroad company to cut off an adjacent land-owner from convenient access to the street. This right of access is an individual not a public right, and the land-owner, in claiming damages for being deprived of it, is complaining not of a public but of a private nuisance."

Cooley on Torts, p. 733.

In *Stetson* vs. *Faxon* (19 Pick., 147) a warehouse projecting into a street and obstructing the view from the plaintiff's warehouse was held to be a nuisance.

In *Knox* vs. *New York* (55 Barb., 404) a bridge built so as to prevent entrance to a building was held to be a nuisance.

In *Schulte* vs. *N. P. T. Co.* (50 Cal., 592) a wall extending into a street was held to be a nuisance.

If a street is obstructed so that access to one's premises is hindered or cut off, it is actionable.

Callanan vs. *Gilman*, 14 N. E. Rep., 264, N. Y.

Brakken vs. *Minn., etc., Ry. Co.*, 29 Minn., 41.

Wilder vs. *De Cou*, 26 Minn., 10.

The plaintiff-in-error here might have brought suit in the Court of Chancery of New Jersey and have obtained an injunction prohibiting the alteration in Ferry street under the ordinance without compliance with the statutory provisions as to damages. He had a *concurrent* right to abate the nuisance created by the obstructions without recourse to the courts.

"One instance in which redress by the act of the party is admitted is where a nuisance exists to his prejudice; either a private nuisance or a public nuisance from which he suffers a special and peculiar injury. The redress here consists in removing that which constitutes the nuisance, and it is allowed, not because of any injury it may have done, but to prevent the injury it may do. It is, therefore, in some sense, a preventive remedy, not a compensatory remedy; for damages suffered the party is left to the ordinary action. The question who may abate a nuisance may depend upon whether the nuisance is public or private. If it is a private nuisance, he only can abate it who is injured by its continuance; if it is a public nuisance, he only may abate it who suffers a special grievance not felt by the public in general. Therefore, if one places an obstruction in a public street, an individual who is incommoded by it may remove it."

Cooley on Torts (p. 48).

Lincoln vs. *Chadbourne*, 56 Me., 197.

The proprietors of a steamboat on a navigable river may tear away sufficient of a bridge to enable them to take their boat through where the bridge has been constructed without a draw and the proprietors after

notice have neglected to remove the bridge or put in a draw.

State vs. *Parrott* (71 N. C., 311).

One may remove a wharf built in navigable water in front of and disconnected with his land which prevents access to it.

Larson vs. Furlong (63 Wis., 323).

In *Brown* vs. *Perkins* (12 Gray, 89, 101) Mr. CHIEF JUSTICE SHAW says:

"The true theory of abatement of nuisance is, that an individual citizen may abate a private nuisance injurious to him, *when he could also bring an action;* and also when a common nuisance obstructs his individual right, he may remove it to enable him to enjoy that right, and he cannot be called in question for so doing."

In *Wetmore* vs. *Tracy* (14 Wend. 250), the right of an individual citizen personally to abate a fence which encroached upon a public highway was sustained by the Supreme Court of the State of New York. The Court, speaking through Mr JUSTICE NELSON, said among other things:

"That any citizen has a right to abate a nuisance of this kind, was a question considerably discussed in the case of *Hart* vs. *Mayor of Albany* (9 Wendell, 589, 607, 608), and no doubt was entertained upon it."

In *Harrower and Others* vs. *Ritson* (37 Barb., 301) the Supreme Court of New York said:

"Private nuisances may be abated by the individuals aggrieved by them (3 Blackstone's Com. 5; 2 Bouv. Inst., 574) and public nuisances should only be subject to abatement by one especially aggrieved by them. Blackstone says: 'If a new gate be erected across a public highway, which is a common nuisance, any of the King's subjects passing that way may cut it down and destroy it!'"

The same doctrine is, of course, recognized in the State of New Jersey.

In *Manhattan Manufacturing Co.* vs. *Van Keuren*, 8 C. E. Gr., 251, the Court of Chancery said:

"At common law, it was always the right of the citizen, without official authority, to abate a public nuisance, and without waiting to have it adjudged such by a legal tribunal. His right to do so depended upon the fact of its being a nuisance. If he assumed to act upon his own adjudication that it was, and such adjudication was afterward shown to be wrong, he was liable, as a wrong-doer, for his error, and appropriatiate damages could be recovered against him. This common law right still exists in full force."

And see *Brown* vs. *de Groff*, 21 Vr., 409.

But it is unnecessary to accumulate authorities to sustain so familiar a proposition of law as that which embodies the individual's right to abate a nuisance wherever he might bring an action because of its existence.

These two rights are concurrent. Each is recognized by the *law of the land* as a necessary and proper redress for the protection of private property. It is no more possible to take away the one than the other without violating the law of the land. The plaintiff-in-error occupies precisely the same position that he would have occupied if the New Jersey Court of Errors and Appeals had enjoined him perpetually from asking the Chancellor for an injunction against the construction and maintenance of these nuisances. It is not for the Courts to say which of the two remedies allowed by the law of the land must be pursued. That law recognizing both, the citizen is left to his election, and to take away this right of election is to take away something which is guaranteed by the law of the land.

E.

The Injunction granted by the Chancellor and sustained by the New Jersey Court of Errors and Appeals deprived the Plaintiff-in-Error of the foregoing Right in Violation of the Fourteenth Amendment.

By the decree of the Chancellor, filed April 12, 1895 (Rec. pp. 32–33), the plaintiff-in-error was "perpetually enjoined and restrained not only from further interfering with the laying and completion of the sidewalk and curbing mentioned in the bill of complaint, but also from in any manner removing, disturbing or interfering with the said pavement, sidewalk or curbing after the same shall have been completed." And it was further ordered and decreed that the plaintiff-in-error should pay to the City of Trenton the costs of the suit to be taxed, and that execution issue therefor according to the practice of the Court.

Upon the appeal to the New Jersey Court of Errors and Appeals, that Court decreed that the decree of the Court of Chancery should be in all things affirmed, the costs in both courts to be paid by the appellant (the present plaintiff-in-error), and that the petition of appeal should be dismissed. And it was further ordered that the record should be remitted to the Court of Chancery to proceed further thereon according to law and the practice of said Court (Rec. p. 35).

By the above decrees of the Judicial Authority of the State of New Jersey, the plaintiff-in-error was deprived of his right to abate the nuisance created by the acts of the City of Trenton and the Pennsylvania Railroad Company in violation of the constitutions of the State of New Jersey and of the United States, by virtue of which acts and the creation and continuance

of which nuisance his private property had been taken in defiance of the said constitutions and without any compensation or any provision for compensation whatever.

We contend that under these circumstances the plaintiff-in-error has been deprived of his property without due process of law. We have already, on page 9 of this brief, reminded the Court of the definition which has been placed upon the phrase "*due process of law.*" That under this phrase the citizen is protected against all action of the *State* repugnant to the constitutional limitation of its powers, whether that action be in form legislative or judicial, is, we submit, beyond the realm of controversy. The language of the Fourteenth Amendment is that "no state shall deprive any person of life, liberty or property without due process of law." The limitation necessarily extends to all acts of the State, by whatever branch of its final authority exercised, the effect of which must be to deprive the citizen of his life, liberty or property. The legislative, executive and judicial proceedings of the State governments are alike subjected to the ultimate revision of this Court, by virtue of its office as the final interpreter and guardian of the Federal Constitution, wherever those proceedings necessarily result in the destruction of a fundamental right of the citizen. We respectfully contend that wherever a decision of the highest court of record of a State involves one of the fundamental rights guaranteed to the citizen by the Constitution, or one of the remedies recognized by the law of the land in that State for the protection and preservation of such right, an ultimate power is vested in this Court to review such decision and to reverse it if by its effect either the right or the remedy is destroyed. Could it be successfully argued that if, contrary to the Constitution and statutes of the State of New Jersey, that State's courts should improperly deny to any citizen the

benefit of the writ of *habeas corpus*, this Court would not have the power to annul such denial and to compel judicial acknowledgment of the citizen's right to protected liberty under the Fourteenth Amendment? We think not. In the same way, where, as in this instance, a fundamental right of property, has been violated, and the highest judicial authority in a State has *prohibited* the citizen to whom that right belonged from adopting a form of redress recognized by the *law of the land* in that very State, a case has arisen under the Constitution of the United States which demands the intervention of this Court. Otherwise it would be within the power of a State, by violating its own constitution and statutes, to override every limitation in the Federal Constitution. "Due process of law" is not satisfied, and constitutional protection not exhausted, when the citizen, having sought in the highest court of a State the vindication of his constitutional rights, is dismissed thence, shorn of the remedies without which those rights are unavailing. It is no answer to say that the plaintiff-in-error might have obtained an injunction from the Court of Chancery, if he had gone thither, preventing the erection of the nuisance which he has attempted to abate. In view of the action taken by the Chancellor we have grave doubts whether he would have succeeded on such an application! But, in any event, as we have pointed out, the right of election between the remedies afforded him by the law of the land was as much a right within the guaranty of the Constitution and the protection of this Court as any other right of citizenship.

At the end of his celebrated opinion in *Marbury* vs. *Madison* (1 Cranch 180), Mr. CHIEF JUSTICE MARSHALL, after reviewing a number of clauses of the constitution said:

"Thus, the particular phraseology of the Constitution of the United States confirms and strengthens

the principle, supposed to be essential to all written constitutions, that a law repugnant to the Constitution, is void; and that *courts*, as well as other departments, are bound by that instrument."

We are far from contending that for a mere judicial error of the Supreme Court of record of a State an appeal will lie to this tribunal. Undoubtedly, the clause in the Fourteenth Amendment on which we rely was not intended, and cannot be construed, to vest in the Supreme Court of the United States the power to interfere with the disposition of State questions by the appropriate State authorities. This Court, speaking through its present CHIEF JUSTICE, has expressed in a succinct manner the views which we are pressing, in the case of *Kemmler*, 136 U. S., 448.

"As due process of law in the Fifth Amendment," said Mr. CHIEF JUSTICE FULLER in that case, "referred to the law of the land which derives its authority from the legislative powers conferred on Congress by the Constitution of the United States, exercised within the limits therein prescribed, and interpreted according to the principles of the common law, so, in the Fourteenth Amendment, the same words refer to *that law of the land in each State which derives its authority from the inherent and reserved powers of the State, exerted within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.* Undoubtedly the amendment forbids any arbitrary deprivation of life, liberty or property, and secures equal protection to all under like circumstances in the enjoyment of their rights; and, in the administration, justice requires that no different or higher punishment shall be imposed upon one than is imposed upon all for like offenses. But it was not designed to interfere with the power of the State to protect the lives, liberties and property of its citizens, and to promote their health, peace, morals, education and good order."

In that case the Court of Appeals of the State of New York had declared that a statute of New York

prescribing electrocution as the punishment for capital crimes was not in conflict with the clause of the New York Constitution forbidding cruel and unusual punishments. The argument was that such punishments were prohibited by inclusion in the term 'due process of law.' This Court first defined the meaning of the similar prohibition against the infliction by Congress of cruel and unusual punishments, contained in the Eighth amendment of the Federal Constitution, and declared that the punishment of death "is not cruel within the meaning of that word as used in the Constitution. It implies there something inhuman and barbarous." Referring then to the decision of the Court of Appeals, then before it, where the same words as used in the New York Constitution had been similarly construed, this Court said:

"Treating it as involving an adjudication that the statute was not repugnant to the *Federal* Constitution, that conclusion was so plainly *right* that we should not be justified in allowing the writ upon the ground that error might have supervened therein."

Hence, this Court proceeded upon the principle that the Fourteenth Amendment guarantees to the citizen the *application* of "that law of the land in each State which derives its authority from the inherent and reserved power of the State exerted within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions," and examined the *New York Court of Appeals'* interpretation of the prohibition in the *New York* Constitution against cruel punishments, and upheld that Court's decision *because its interpretation was sound and in accordance with such law of the land.* This Court, we submit, did not mean by the expressions used at the end of the passage quoted on page 35th of this brief that it would uphold as "due process of law" decisions of the State courts, in-

terpretating the constitutions of the same States, which, in the opinion of this Court, are destructive of the fundamental rights of the citizen. On the contrary, the learned Chief Justice expressly asserted the reserve power of this Court to reverse any judgment of a State Court which "*committed an error so gross as to amount in law to a denial by the State of due process of law to one accused of crime, or of some right secured to him by the Constitution of the United States.*"

"We have no hesitation in saying," added the CHIEF JUSTICE, "that this we cannot do *upon the record before us.*"

But suppose the record had been different. Suppose the punishment inflicted had been a *torture*, and the Court of Appeals had declared that such punishment was not in conflict with the Constitution of New York. Would not this Court have had the power under the Fourteenth Amendment to reverse the Court of Appeals' decision, as being contrary to "due process of law," although it might at first sight seem to bear equally, *as fixing the law of New York*, upon all citizens of that State and to impose upon none "a different or higher punishment * * * than is imposed upon all for like offences"? But a more accurate analysis of such a decision would show that, even upon the test of equality, it would fall short of the constitutional requirements, because the action of a court must always be limited to the case before it, and an unconstitutional decision necessarily bears unequally upon the party deprived by it of his rights, since to him alone of the entire community the decision would deny the protection of the law.

What we are contending is that wherever a State Court's interpretation and application of the State's Constitution or the State's statutes affect one of the fundamental rights of the citizen, an ultimate question

remains for this Court to decide, to wit: Whether such interpretation and application are *subversive* of such right. And this because, to quote again from the language of Mr. CHIEF JUSTICE FULLER in the *Kemmler* case, "the amendment furnishes an additional guaranty against any encroachment by the States upon those fundamental rights which belong to citizenship, and which the State governments were created to secure."

If this is true, as it undoubtedly is, must it not follow that a State Court's interpretation and application of the *body of laws* in the State, which affect one of those fundamental rights, are also subject to this Court's ultimate review in order to determine whether such interpretation and application are *subversive* of such right? What distinction can be logically drawn between the two cases? Statute and Common Law alike form the *law of the land*. Indeed, let all the existing statutes be done away with, the greater part of the fundamental law of the land would still remain intact to be administered by the Courts. Would that administration be unrestricted by the Constitution's "additional guaranty against any encroachment by the States upon those fundamental rights which belong to citizenship and which the State governments were created to secure"?

To assert that the word "*State*" as used in the Fourteenth Amendment, where that amendment prohibits "*any State*" from depriving any person of life, liberty or property without due process of law, means only the *Legislature* of a State, and does not include the other governmental departments, would be to limit the meaning of this constitutional guarantee of fundamental rights in a manner manifestly contrary to its language, spirit and object. The common law extant in any State, and left unchanged by the State Constitution and Legislature, derives its authority from the State as much as any statute. By omitting to destroy it, the State, and

more especially the legislative branch of the State, tacitly ratifies and corroborates it. It would seem to follow from these considerations that the statutes and unwritten laws together form that "law of the land" in each State, the application of which in all cases this Court is authorized to compel by the Fourteenth Amendment.

By what means can this Court perform its function in that regard, except by direct action upon the courts of a State? In what way other than by writ of error addressed to the court of final resort in the State can the outraged individual call upon this Court to enforce his constitutional guaranty? With what weapon other than the *wrongful decision of its courts* can the State in any case, whether under a statute or the common law, attack the fundamental rights of citizens, protected by the United States Constitution? Even when the State Legislature has enacted a statute utterly in disregard of those rights, no individual can come to this Court with his complaint until *the State, acting through its courts*, has upheld the obnoxious statute and declared it to be constitutional. So that in every instance where a State deprives a person of his fundamental rights, that deprivation consists in the end in a *decision of the State Court* repugnant to the Federal Constitution, and, therefore, reversible by this tribunal.

This peculiar part played by the State *Courts* in violations of the Federal Constitution by the States is discussed with great strength by Mr. CHIEF JUSTICE MARSHALL in the case (already cited) of *Marbury* vs. *Madison*. There, after pointing out the superiority of the Constitution over statutes violative of its provisions, he said:

"If an act of the Legislature, repugnant to the Constitution, is void, does it, notwithstanding its invalidity, bind the Courts, and oblige them to give it effect? Or, in other words, though it be not law, does it constitute

a rule as operative as if it was a law? This would be to overthrow in fact what was established in theory, and would seem, at first view, an absurdity too gross to be insisted on. It shall, however, receive a more attentive consideration.

"It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the Courts must decide on the operation of each.

"So, if a law be in opposition to the Constitution, if both the law and the Constitution apply to a particular case, so that the Court must either decide that case conformably to the law, disregarding the Constitution, or conformably to the Constitution, disregarding the law, the Court must determine which of these conflicting rules governs the case. This is the very essence of judicial duty.

"If, then, the Courts are to regard the Constitution, and the Constitution is superior to any ordinary act of the Legislature, the Constitution, and not such ordinary act, must govern the case to which they both apply."

The learned Chief Justice then cites certain instances where the Constitution addresses the Courts directly, and adds:

"From these and many other selections which might be made, it is apparent that the framers of the Constitution contemplated that instrument as a rule for the government of Courts as well as of the Legislature."

Following precisely this reasoning of Mr. CHIEF JUSTICE MARSHALL, if the New Jersey Court of Errors and Appeals has declared that to be law which is subversive of the fundamental rights of any person to life, liberty or property, then its declaration is an act of the State of New Jersey which is violative of the United States Constitution and void. Under our form of constitutional government, it is inconceivable that anything shall be law which conflicts with the Federal Constitution, the organic law of the land. Hence in declaring a statute in such conflict to be void, this Court

simply obliterates the statute and leaves the *law* as it existed before such statute was enacted. Its subsequent action in overruling a decision of the State Court based on the void statute, is, therefore, in effect nothing but a direct action upon the power of the State, as exhibited in its *judicial* acts, and an exercise of the power of this Court to compel the *Courts* of the States to administer the *law of the land* in conformity with the Constitution regardless of futile attempts on the part of legislatures to *alter* that law. And whether the *bad* law which a State Court has proclaimed was ever arrayed in void *legislative* language, or not, cannot, we submit, logically affect the issue.

We have argued this point at length because there is a class of cases decided by this Court which at first sight might seem to conflict with the above views. But we respectfully submit that the decisions to which we refer were not intended to deny the right of this Court to overrule the decisions of State courts where those decisions are *undeniably* subversive of the personal rights of life, liberty and property. *We do not contend*—and the cases to which we allude are, we think, emphatic authorities on this point—that by the Fourteenth Amendment this Court is called upon or empowered to review the decisions of State courts in State questions; or, to use the language of Mr. CHIEF JUSTICE FULLER, in the case of *Converse*, 137 U. S., 624, "to interfere with the power of the State to protect the lives, liberty and property of its citizens; nor with the exercise of that power in the adjudications of the Courts of a State *in administering the process provided by the law of the State.*" It would indeed be intolerable if every litigant should be permitted to use this Court as a court of error to review the decisions of State courts claimed to be erroneous, rendered "*in administering the process provided by the law of the State.*"

But where such decisions, instead of *administering* that process, effectually *abrogate* it; where they *deny* to the citizen the very rights which the law of his State is fashioned to *protect*, and those rights constitute his fundamental rights of property, liberty and life, or rights incidental thereto and without which the former would be unavailing—then, we contend, it is the province and duty of this Court to declare that the State has deprived the citizen of his rights without due process of law, and to *reinstate* him in those rights as guaranteed by the Constitution.

In conclusion, we will simply refer to the cases mentioned above.

In *Arrowsmith* vs. *Harmoning*, 118 U. S., 194, the question was whether this Court would review a decision of the State courts of Ohio sustaining the action of a probate court of that State in decreeing a sale of land by a guardian in proceedings which were altogether regular, save only that the Probate Court had dispensed with the giving of a bond by the guardian, under a certain requirement of an Ohio statute, "for the faithful discharge of his duties, and the faithful payment and accounting for all moneys arising from such sale according to law."

This Court, speaking through Mr. CHIEF JUSTICE WAITE, declined to review the decision.

"It is not denied," said the CHIEF JUSTICE, "that the Probate Court had full and complete jurisdiction of the proceeding to sell the land. The statute under which the Court acted would, if followed, have furnished Arrowsmith all the protection which had been guaranteed to him by the Constitution of the United States. The bond in question was matter of procedure only, and if it ought to have been required, the Court erred in ordering the sale without having first caused it to be filed and approved. At most, this was an error of judgment in the Court. The constitutional provision

is " nor shall any *State* deprive any person of life, liberty or property without due process of law." Certainly a State cannot be deemed guilty of a violation of this Constitutional obligation simply because one of its courts, *while acting within its jurisdiction*, has made an erroneous decision. The Legislature of a State performs its whole duty under the Constitution in this particular when it provides a law for the government of its courts while exercising their respective jurisdictions, which, if followed, will furnish the parties the necessary constitutional protection. All after that pertains to the courts, and the parties are left to the appropriate remedies for the correction of errors in judicial proceedings."

We respectfully submit that the rather broad expressions used by Mr. CHIEF JUSTICE WAITE in the above passage are to be read in connection with the decision before him and with his own view of such decision, that it was " only an error of judgment in the Court " in a mere " matter of procedure." It does not seem to us that the learned Chief Justice could have intended to deny the application of the constitutional limitation to the action of State Courts in matters, not simply of procedure under the laws of the respective States, but of the *substantive* and *substantial* rights of persons to protect their lives, liberty and property. That the remarks quoted must be read with this caution seems to us clear when it is remembered that in the present case, for instance, or in the case suggested by us at an earlier point in this brief of a Court's denial of the benefit of the writ of *habeas corpus*, the citizen exhausts all of his " remedies for the correction of errors in judicial proceedings," so far as the State is concerned, when he appeals to the highest Court of the State. Yet, with the hostile decision of that Court, he is left denuded of one of his inherent and most far-reaching rights as effectually as if he had been stripped by direct, unequal and unconstitutional statutory enactment.

Moreover, Mr. CHIEF-JUSTICE WAITE limits his remarks to cases where the State Court is "*acting within its jurisdiction.*" In the present case it can scarcely be claimed that the Court of Chancery was "acting within its jurisdiction" when it granted the injunction complained of. The power of a Court of Equity does not extend to the granting of injunctions against the exercise of unquestionable rights of property. Its jurisdiction of the parties cannot draw to it jurisdiction of the subject-matter, and where, as in this case, the proper decree to have been entered under any circumstances would have been a dismissal of the bill, the Court cannot be said to have had jurisdiction of the subject-matter.

In *Ex parte Yarbrough*, 110 U. S., 651–653, Mr. JUSTICE MILLER said:

"That this Court has no general authority to review on error or appeal the judgment of the Circuit Courts of the United States in cases within their criminal jurisdiction is beyond question; but it is equally well settled that when a prisoner is held under the sentence of any Court of the United States in regard to a matter wholly beyond or without the jurisdiction of the Court, it is not only within the authority of the Supreme Court, but it is its duty, to inquire into the cause of commitment when the matter is properly brought to its attention, and if found to be, as charged, a matter of which such a Court had no jurisdiction, to discharge a prisoner from confinement."

In *Baldwin* vs. *Kansas*, 129 U. S., 52, the question was whether upon the trial of one convicted of murder in a State Court of Kansas the form of oath prescribed by the statutes of Kansas had been administered to the jurors. It was claimed that it had not been, and that, therefore, the convicted party would be deprived of his life without due process of law. This Court carefully examined the record as to the oath administered, and *agreed* with the State Court that the statement in the record, as to the form of oath administered was en-

tirely consistent with the fact that the prescribed form had been administered. It also *agreed* with the State Court that the failure of the accused to take objection at the trial to the form of oath administered was fatal to his case.

"This statement of the condition of the record" said the Court, speaking through Mr. JUSTICE BLATCHFORD, "shows that no Federal question is presented, in regard to the oath administered to the jurors, of which this Court can take jurisdiction."

If the record had been different, it is clear that the Court would have taken jurisdiction and *would have reviewed the action of the State Court in administering the oath*, and, if necessary, have afforded a new trial to the plaintiff-in-error. This case is, therefore, an authority for the doctrine for which we argue.

In re Converse, 137 U. S., 624, to which we have already referred, the petitioner had been convicted of embezzlement under a certain statute of Michigan. He had pleaded guilty to embezzlement as an *attorney-at-law*, and the question was whether this plea was a plea of guilty to the crime charged under the statute, so that the conviction entered on this plea was binding. The decision turned on the meaning of the word "*agent*" in the statute, and the Supreme Court of Michigan held that that description included an "*attorney-at-law*," and therefore sustained the conviction. This Court was asked to take the opposite view on the ground that the petitioner had thus been deprived of his liberty without due process of law. The Court, speaking through Mr. CHIEF JUSTICE FULLER, said:

"It is not our province to inquire whether the conclusion reached and announced by the Supreme Court was or was not correct, for we are not passing upon its judgment as a court of error, nor can we consider the contention that the decision was not in harmony with the state constitution and laws.

"The single question is whether the appellant is held in custody in violation of the Fourteenth Amendment to the Constitution of the United States, in that the State thereby deprives him of liberty without due process of law; for there is no pretense of an abridgment of his privileges and immunities as a citizen of the United States, nor of a denial of the equal protection of the laws. But the State cannot be deemed guilty of a violation of its obligations under the Constitution of the United States because of a decision, even if erroneous, of its highest court, while acting within its jurisdiction. And, conceding that an unconstitutional conviction and punishment under a valid law would be as violative of a person's constitutional rights as a conviction and punishment under an unconstitutional law, we fail to perceive that this conviction and judgment are repugnant to the constitutional provision. Appellant has been subjected, as all persons within the State of Michigan are, to the law in its regular course of administration through courts of justice, and it is impossible to hold that a judgment so arrived at is such an unrestrained and arbitrary exercise of power as to be utterly void.

"We repeat, as has been so often said before, that the Fourteenth Amendment undoubtedly forbids any arbitrary deprivation of life, liberty or property, and in the administration of criminal justice requires that no different or higher punishment shall be imposed on one than is imposed on all for like offenses; but it was not designed to interfere with the power of the State to protect the lives, liberty and property of its citizens; nor with the exercise of that power in the adjudications of the courts of a State in administering the process provided by the law of the State. The Supreme Court of Michigan did not exceed its jurisdiction or deliver a judgment abridging appellant's privileges or immunities or depriving him of the law of the land of his domicile. (Arrowsmith *vs.* Harmoning, 118 U. S., 194; Baldwin *vs.* Kansas, 129 U. S., 52; *In re* Kemmler, 136 U. S., 436.)"

We submit that this decision does not affect a case where the complaint is, not that a State Court has erred in defining a word contained in an *ambiguous* State

statute, but that, with the law of the State *undeniably* in favor of the plaintiff-in-error's right to protect his property and to remove the nuisance, the State Court without the shadow of justification refused to administer that law in his behalf and absolutely denied him his lawful rights. The State Court *has* deprived him "of the law of the land of his domicile," and *has* denied to him the equal protection of the laws, since those laws, existing for the benefit of all, and within the reach of all, have been by this decree denied to him *alone*.

The case of *Hallinger* vs. *Davis*, 146 U. S., 314, does not touch the question now under discussion, and we only cite it because Mr. JUSTICE SHIRAS, in the course of delivering the opinion of the Court, showed that this Court will inquire, under the Fourteenth Amendment, into the obedience of the State courts to the process prescribed by the laws of their respective States.

"The trial," said Mr. JUSTICE SHIRAS, alluding to the trial then under discussion, "seems to have been conducted in strict accordance with the forms prescribed by the Constitution and laws of the State, and with special regard to the rights of the accused thereunder."

In *McNulty* vs. *California*, 149 U. S., 647, the question was wholly different from that now presented. There it was contended that the execution of one who had been sentenced to death would be without due process of law because certain amendments, subsequent to the date of the crime, had altered the law as it existed at that date, and these amendments had not been considered by the State Court.

"But this argument," said Mr. CHIEF JUSTICE FULLER, "amounts to no more than the assertion that the Supreme Court of the State erred as to the proper construction of the statutes of California, an inquiry it is not within our province to enter upon, *or that the*

Court committed an error so gross as to amount in law to a denial by the State of due process of law or of some right secured to the plaintiff-in-error by the Constitution of the United States, a proposition not open to discussion upon the record before us."

In the case at bar the Court of New Jersey *did* commit an error so *gross* as to amount in law to a denial by the State of due process of law, and it is to correct this error that we are before this Court. The case is wholly different from cases of judicial construction of *ambiguous* State statutes. Here, the law being certain and undeniable, the Court deliberately refused to extend its benefits to the plaintiff-in-error.

In *Caldwell* vs. *Texas*, 137 U. S., 693, Mr. CHIEF JUSTICE FULLER stated in clear terms the effect of the Fourteenth Amendment:

"By the Fourteenth Amendment," he said, "the powers of the States in dealing with crime within their borders are not limited, but no State can deprive particular persons or classes of persons of equal and impartial justice under the law. Law, in its regular course of administration through courts of justice, is due process, and, when secured by the law of the State, the constitutional requisition is satisfied (2 Kent's Comm., 13). And due process is so secured by laws operating on all alike, and not subjecting the individual to the arbitrary exercise of the powers of government, unrestrained by the established principles of private right and *distributive justice* (*Bank of Columbia* vs. *Okley*, 4 Wheat., 235, 244). The power of the State must be exerted within the limits of those principles, and its *exertion* cannot be sustained when special, partial and arbitrary."

It is through the courts that the power of *States* is *exerted*, through them that *distributive justice* is attained. Of what avail to the citizen are beneficial laws if he cannot secure their application by the courts in his behalf? Of what avail to him are fair trials, days

in court and opportunities to present his claims, if, after all is done, it lies within the power of Courts to *decide* in violation of the law? The Fourteenth Amendment has failed of its purpose, as proclaimed by this Court, if, extending to the *process* of courts from *summons* to *decision*, it stops short at the very juncture where, for the first time, it becomes of real importance to the citizen—we mean, THE FINAL JUDGMENT.

It is respectfully submitted that the decree of the Court of Errors and Appeals of the State of New Jersey should be reversed and the cause remanded to that Court with directions to enter a decree dissolving the injunction granted by the Court of Chancery, and with such other directions as to this Court may seem proper.

DAVID MCCLURE,
Of Counsel for Plaintiff-in-error.

McQUADE *v.* TRENTON.

ERROR TO THE COURT OF ERRORS AND APPEALS OF THE STATE OF NEW JERSEY.

No. 125. Argued January 12, 1899. — Decided January 30, 1899.

A decision by a state court of a Federal question will not sustain the jurisdiction of this court if another question, not Federal, was also raised and decided against the plaintiff in error, and the decision thereof is sufficient, notwithstanding the Federal question, to sustain the judgment; and much more is this the case where no Federal question is shown to have been decided, and the case might have been, as this case probably was, disposed of upon non-Federal grounds.

THIS was a bill in equity filed in the Court of Chancery of the State of New Jersey by the inhabitants of the city of Trenton against John McQuade, to enjoin him from interfering with the relaying of a certain pavement, and the resetting of the curb and gutter in front of his premises, in the city of Trenton.

The bill averred, in substance, that a change of grade on the street in front of the premises of the defendant was made by a city ordinance, at the special request of the Pennsylvania Railroad Company, upon an agreement by the latter to make the changes, to carry off all the surface water diverted or changed by the alteration, and to indemnify the city; but that the defendant McQuade, who owned a lot upon the street in question, not only notified the workmen to desist from changing the grade, but forcibly interfered with their work by throwing hot and cold water on the men engaged in such work, and thus tried to prevent its being carried on; and that after the pavement had been relaid in front of his property, he tore it up and rendered it nearly impassable for pedestrians by digging a hole in the sidewalk in front of his premises and keeping the same filled with water.

In his answer, defendant denied that the railroad company had provided means to carry off the surface water, and alleged that the provisions made were utterly inadequate, and that his property had been damaged by the overflow of water

into his cellar. He further averred that the change of grade authorized by the city ordinance was not a proper change of grade, but that the alteration related to the construction of approaches to an elevated bridge, and was a matter over which the common council could not exercise any legal authority whatsoever; that by the attempted alteration of the grades, the surface water, instead of passing through the street, was caused to accumulate immediately in front of the defendant's property, and was likely to overflow the sidewalk and into the defendant's cellar; that if the sidewalk in front of defendant's property were raised to the grade mentioned in the ordinance, the cellar windows of his house would be practically closed up and his free access to the street greatly impaired; that the alteration of the grade was a work carried on at the expense of and for the sole benefit of the railroad company; that such company had no authority under the law to do the work and thereby damage defendant's property without first making compensation for the damage he would sustain by reason of such work, and that he had a right to prevent the completion of the work until he should have received full compensation for all damages he would sustain by such work, and hence that complainants were not entitled to the relief prayed for. Further answering, he insisted that under the constitution of the State he had a right to free access to the street from his property and to the free admission of light and air; and that no alteration in the grade of the street could be lawfully made until a proper method of procedure should have been prescribed by the legislature for the exercise of the power of eminent domain, "whereby this defendant may receive proper and adequate compensation for the damage that will result to him by said alteration of grades and exclusion of light and air."

The case was heard upon the pleadings and proofs, and a decree rendered that the defendant be perpetually enjoined from interfering with the completion of the sidewalk and curbing, and from removing or interfering with the pavement, sidewalk or curbing after the same shall have been completed.

Opinion of the Court.

In his opinion the Vice Chancellor put the case upon the grounds that the defendant had no right to take the law into his own hands and bid defiance to the city authorities; that the city being liable for damages sustained, because of the want of repaired streets, and having undertaken to repair them according to the grade which had been prescribed, the court was justified in enjoining defendant from any interference; that the only question at issue was one with respect to the damages to which McQuade was entitled; that he might have ascertained these before the city or railroad company took any steps, but that he allowed the company to go on and make all the changes necessary without taking direct proceedings to compel them to ascertain the damages and compensate him, and that he has still an ample remedy for a redress of his grievances without interfering with the right of the public to the use of the street in front of his dwelling.

From this decree McQuade appealed to the Court of Errors and Appeals upon the ground that under such decree the complainants were permitted to take and damage his property for public use without compensation, because no procedure for taking and injuring his property in the manner set forth had been prescribed by the legislature, and "because the decree is in sundry other respects contrary to the Constitution of the United States and to the law of the land." The petition of appeal was dismissed by the Court of Errors and Appeals and the case remanded for an execution of the decree. No written opinion was delivered.

Mr. David McClure for plaintiff in error.

No appearance for defendant in error.

Mr. Justice Brown, after stating the case, delivered the opinion of the court.

The principal contention of the plaintiff in error (the defendant below) is that, as he had never been compensated in

damages for the injury to his property by altering the grade of the street in front of his lot, he had a right to abate the nuisance caused by the proposed changes, and that in the refusal of the state court to recognize this principle he had been deprived of his property without due process of law within the meaning of the Fourteenth Amendment to the Federal Constitution. But no such question was raised in the pleadings, unless the allegation of the answer that the plaintiffs had no right to make the alterations in question without first compensating defendant for his damages, be treated as equivalent to an allegation that his property had been taken without due process of law. The right of the defendant to damages was, however, assumed in the opinion of the Vice Chancellor, who disposed of the answer by saying that the defendant had mistaken his remedy, and must resort to another proceeding against the city for his damages. This was beyond all doubt a ruling broad enough to support the decree regardless of any Federal question that possibly might have been raised from the allegation of the answer. In his petition for an appeal defendant repeated his allegation that his property had been damaged without compensation, and averred generally that the decree was contrary to the Constitution of the United States, but made no specific allegation of any conflict therewith. As the Court of Errors and Appeals delivered no opinion, it is impossible to state definitely upon what ground the decree of the Vice Chancellor was affirmed. The presumption is that it was satisfied with the opinion of the court below, and affirmed the decree for reasons stated in the opinion of the Vice Chancellor; but however this may be, it is quite evident that a Federal question was not necessarily involved in the case, and hence that this court has no jurisdiction. *Kaukauna Water Power Co.* v. *Green Bay &c. Canal Co.*, 142 U. S. 254; *Chicago Life Ins. Co.* v. *Needles*, 113 U. S. 574; *Eureka Lake &c. Canal Co.* v. *Yuba County*, 116 U. S. 410.

We have repeatedly held that even the decision by the state court of a Federal question will not sustain the jurisdiction of this court, if another question not Federal were also raised and decided against the plaintiff in error, and the decision thereof

be sufficient, notwithstanding the Federal question, to sustain the judgment. Much more is this the case where no Federal question is shown to have been decided, and the case might have been, and probably was, disposed of upon non-Federal grounds. *Harrison* v. *Morton*, 171 U. S. 38; *Bacon* v. *Texas*, 163 U. S. 207, and cases cited.

The writ of error in this case must therefore be

Dismissed.